TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 719.

THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED JULY 7, 1911.

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a The United States of America:

At a Commerce Court of the United States begun and held in the city of Washington, District of Columbia, on the 24th day of May, A. D. 1911; present: Honorable Martin A. Knapp, presiding judge; Honorable Robert W. Archbald, Honorable William H. Hunt, Honorable John E. Carland, Honorable Julian W. Mack, judges; Blackburn Esterline, Esq., special assistant to the Attorney General; F. Jerome Starek, Esq., marshal; George F. Snyder, clerk, among other were the following proceedings, to wit:

No. 39.

THE BALTIMORE AND OHIO RAILROAD COMPANY; THE PENNSYLVANIA Railroad Company; The Pennsylvania Company; Buffalo, Rochester and Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; The Wheeling and Lake Erie Railroad Company and B. A. Worthington, receiver thereof; The Lake Shore and Michigan Southern Railway Company; The Pittsburgh and Lake Erie Railroad Company; Buffalo and Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo and Susquehanna Railway Company; The Western Maryland Railway Company; The Pittsburgh, Shawmut and Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners.

vs.

UNITED STATES, RESPONDENT, AND INTERSTATE COMMERCE COMMISSION, intervening respondent.

b Appearances: Hugh L. Bond, jr., Esq., George F. Brownell, Esq., George Stuart Patterson, Esq., Clyde Brown, Esq., and William M. Duncan, Esq., solicitors for the petitioners; James A. Fowler, Esq., and Blackburn Esterline, Esq., solicitors for the United States; P. J. Farrell, Esq., solicitor for the Interstate Commerce Commission.

Be it remembered that on the 27th day of April, 1911, came the petitioners in the above-entitled cause, by their solicitors, and filed in the clerk's office of said court their certain petition for injunction and exhibits accompanying said petition, which said petition and exhibits (excluding Exhibit B) are in the words and figures following, to wit:

1 In the United States Commerce Court.

Petition for Injunction, Etc.

May Session, 1911.

No. 39.

THE BALTIMORE AND OHIO RAILROAD COMPANY; THE PENNSYLVANIA Railroad Company; The Pennsylvania Company; Buffalo, Rochester and Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; The Wheeling

and Lake Erie Railroad Company and B. A. Worthington, receiver thereof; The Lake Shore and Michigan Southern Railway Company; The Pittsburgh and Lake Erie Railroad Company; Buffalo and Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo and Susquehanna Railway Company; The Western Maryland Railway Company; The Pittsburg, Shawmut and Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners,

vs.

UNITED STATES, RESPONDENT.

2 To the Judges of the Commerce Court of the United States:

The Baltimore and Ohio Railroad Company, a corporation of the State of Maryland; The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania; The Pennsylvania Company, a corporation of the State of Pennsylvania; Buffalo, Rochester and Pittsburgh Railway Company, a corporation of the States of New York and Pennsylvania; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, a corporation of the States of Pennsylvania, West Virginia, Indiana, and Illinois; The Wheeling and Lake Erie Railroad Company, a corporation of the State of Ohio, and B. A. Worthington, receiver thereof; The Lake Shore and Michigan Southern Railway Company, a corporation of the States of Illinois, Ohio, Michigan, Indiana, Pennsylvania, and New York; The Pittsburgh and Lake Erie Railroad Company, a corporation of the State of Pennsylvania; Buffalo and Susquehanna Railway Company, a corporation of the State of New York; Harry I. Miller, receiver, Buffalo and Susquehanna Railway Company; Erie Railroad Company, a corporation of the State of New York; The Western Maryland Railway Company, a corporation of the State of Maryland; and The Pittsburgh, Shawmut and Northern Railroad Company, a corporation of the States of New York and Pennsylvania, and Frank Sullivan Smith, receiver thereof, bring this, their petition for an injunction against the enforcement of and a decree setting aside and annulling a certain order of the Interstate Commerce Commission, made on the twenty-fourth day of February, 1911, and more particularly mentioned hereinafter, and thereupon your petitioners complain and say:

1. That your petitioners are engaged in the transportation of passengers and property by railroad from one State to another
3 and in respect of such transportation are therefore subject to the various acts enacted by the Congress of the United States regulating and affecting interstate transportation of the character mentioned in said acts, in so far as those acts are not repugnant to the Constitution of the United States and therefore invalid.

2. That the Interstate Commerce Commission is a commission created and established by and which now exists under and by virtue of an act of Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, and various other acts amendatory thereof and supplementary thereto.

3. These petitioners have been for many years and are now engaged in the interstate transportation, among other traffic, of a large volume of traffic in coal destined to points on the lines of other railroad carriers necessary and intended for use and used by such other railroad carriers, respectively, in the conduct of their business as common carriers.

The movement of said traffic on the lines of the carriers transporting it from the point of origin to the point of junction with the lines of the carrier for whose use the coal is intended differs from the movement of shipments of coal to be delivered locally at such junction point. The delivery at the junction point is made by placing each car on the exchange tracks used for all through shipments. No free time is allowed, and no sidetrack delivery is made, as would be the case in respect to shipments for local delivery. The receiving carrier accounts for the use of the car to its owner, and relieves the delivering carrier from all cost and responsibility with respect to the car and its contents from the time the car is placed upon the exchange track. In these respects among others the transportation of the said shipments of fuel coal costs the carriers to junction point less than the transportation of coal to be delivered locally at that point.

4 The movement of the said traffic on the lines of the carrier which uses it is not governed by the rates published under the several acts of Congress above mentioned, which apply to the movement thereon of traffic in coal not for the use of such consuming railroad company, because the charges for the movement of such traffic on such carrier's line go to the carrier itself. In case such railroad fuel coal be shipped under a through rate applicable to traffic in other coal transported to a point on the lines of the consuming railroad company, the actual rate upon which such fuel coal moves to the rails of the consuming road is the division of the through rate going to the roads over which the traffic moves up to the junction point with the rails of the consuming road. The division of the rate beyond that point goes to the consuming road itself.

All but an inconsiderable part of said coal is necessary and intended for use as fuel for locomotives. The fueling stations are often many and are located at convenient points along the line at varying distances from the junction points at which the coal is or may be received from connections. At the time of shipment from the point of origin it is not possible for the consuming carrier to tell at what point a carload of coal will be needed when the shipment subsequently reaches its line. If such shipments be made on published through rates to which the consuming carrier is a party, they must be billed and actually transported to some point to which such a through rate is published. Even if a centrally located distributing yard for fuel coal be established, and all shipments be billed on a through rate to that yard, there must be a reverse movement of all coal needed for fueling between that point and the point of junction.

The fact that the movement of such fuel coal on the line of the consuming carrier is not governed by the published rates operates
5 to make the commercial competitive conditions affecting the traffic in this fuel coal, as between such traffic coming on to the line of the consuming road from different junction points or at the same junction point from different points of origin on the same or different lines of railroad, different and distinct from the commercial conditions affecting traffic in other coal and such as are not and can not be met by applying the same through rates to fuel coal traffic as to traffic in other coal. The value to the shipper is not the same or measured by the same conditions in the case of the service rendered by the carriers in transporting the railroad-fuel coal up to the junction joint with the consuming road as in the case of the transportation of other coal going to the line of the consuming road transported up to such junction point. There is no commercial competition between the railroad-fuel coal and the other coal.

These petitioners respectfully refer to their several answers contained in their "Exhibit B" herewith for further and more particular statements of the facts, circumstances, and conditions attaching to and affecting the said traffic in railroad fuel coal and the transportation of the same, and pray that the statements of such facts, circumstances, and conditions in said answers be taken as part hereof.

Because of the circumstances and conditions differentiating the traffic in railroad fuel coal, these petitioners have for a number of years past published and filed, as required by law, separate tariffs of the rates to be charged and received by them for the transportation of the traffic in railroad fuel coal from the points of origin to the junction point of delivery to the line of the consuming carrier. The said tariffs vary in their definitions or descriptions of the traffic to which the rates apply, but in each case the traffic covered by the tariff is such and only such as on the line of the railroad carrier to junction with which the rates apply would move in reality not under the published through rates to points on that line, but would
6 move under the special conditions hereinabove stated as applicable to traffic in fuel coal moving on the line of the consuming road. Some of said tariffs apply only to coal necessary, intended for use and used for locomotive fuel. The rates named in said tariffs are open and available to all producers and shippers, but are applicable only to shipments to which the special conditions above stated apply.

4. On January 4th, 1910, the Interstate Commerce Commission on its own motion instituted an inquiry under an order of that date, entitled "In the Matter of Restricted Rates," Docket No. 3053, making the petitioners, the Baltimore and Ohio Railroad Company and The Pennsylvania Railroad Company, original defendants to the proceeding, to which the other petitioners were admitted as intervenors respondent by orders entered from time to time. Thereafter the commission took the testimony of certain witnesses, and heard

arguments of counsel; and on the twenty-fourth day of March last the commission served upon these petitioners its report and order against your petitioners, being the order first hereinabove referred to, a copy of which report and order is hereto attached and marked "Exhibit A." By said order the commission requires your petitioners, on or before the fifteenth day of May, 1911, to cease and desist, and for a period of two years thereafter, to abstain from maintaining and using such tariffs on coal as are hereinabove mentioned and described. These petitioners file herewith, marked "Exhibit B," a duly certified copy of the order of the commission dated January 4th, 1910, and the order amendatory thereof dated May 9th, 1910, of the answers of the respondents, and of the testimony taken in the proceeding, all of which said "Exhibit B" these petitioners hereby refer to and make part of this petition.

5. That the commission erred in the construction placed by them upon the act to regulate commerce and acted upon an erroneous view of the meaning of the statute in making their said order, in
7 that the commission held that the facts, circumstances, and conditions admitted and found by them, as relating to and affecting said traffic in railroad fuel coal, could not in law be considered to make the said traffic in railroad fuel coal unlike the traffic in other coal or to make the carriage of such railroad fuel coal a service unlike the service performed in the carriage of other coal, and were not in law circumstances and conditions necessary or proper to be considered in applying the provisions of section 2 of the act to regulate commerce.

6. The commission erred in holding that the rates fixed by the said tariffs for transportation to the junction point on shipments of coal going on to the line of the connecting carrier for further movement by it must under the provisions of section 2 of the act to regulate commerce be no more and no less than the rates charged on shipments of coal from the same origin for local delivey at said junction point. The facts, circumstances, and conditions admitted and found by the commission and undisputed, with respect to the two classes of shipments, show conclusively that the services done in the transportation of them, respectively, are not like; that the traffic in the one class of shipments is not of like kind with the traffic in the other class and that the circumstances and conditions under which the two classes of shipments are transported are not substantially similar within the true meaning of the act to regulate commerce.

7. The commission erred in holding that all shipments of coal going to points on the line of a carrier by railroad must be transported under the through rates agreed upon by that carrier and the other line carriers over connecting roads from points of origin, and that it is unlawful for such connecting roads to publish, as required by law, and charge any rates other than the agreed through rates on shipments going to the line of the terminal carrier, which are shipments of coal necessary and intended for the use of such terminal carrier in the conduct of its business as a common carrier.

8 8. The commission erred in holding that the facts, circumstances, and conditions admitted and found by them, to wit: That as to shipments of coal necessary and intended for the use of the terminal carrier in the conduct of its business as a common carrier the charges for transportation on such terminal carrier's line are and must be both received and borne by such carrier itself—do not constitute circumstances or conditions differentiating in law the traffic in such coal, moving from points on the lines of connecting carriers to points on the line of such terminal road, from traffic in shipments of other coal moving between the same points of origin and destination.

9. The commission erred in holding that the facts, circumstances, and conditions stated in the next preceding paragraph do not constitute a substantial difference, under the second section of the act to regulate commerce, in the conditions of transportation of such railway fuel coal from a point on the producing line to a point on the consuming line as compared with the transportation of commercial coal between those same points.

10. The commission erred in holding that any and every tariff of rates on coal necessary and intended for the use of a carrier by railroad in the conduct of its business as a common carrier, and not applicable to all other coal, are unjustly discriminatory in violation of section 3 of the act and therefore unlawful. It appears on the face of the report and order of the commission that in formulating the order the commission acted upon that view of the meaning of the second and third sections of the act to regulate commerce, which is expressed in the report. The commission did not find it necessary to consider any specific tariff or tariffs or the rates named thereby. The commission were of the opinion that the facts, circumstances, and conditions surrounding, attaching to, or affecting the traffic in railway fuel coal and not attaching to or affecting traffic in other
9 coal, as hereinbefore set forth, could not lawfully be considered by them as distinguishing the first mentioned traffic from the second mentioned. The facts are undisputed; the question of degree of difference or distinction justified by the facts was not considered; the findings in the report of the commission are findings of law as well in regard to violation of the third section of the act to regulate commerce as in regard to violation of the second section.

11. That if your petitioners are required to obey said order of the commission pending final determination in this suit, they will suffer and sustain irreparable damage in that they will be required either to desist from the carriage of the railroad fuel traffic and lose the revenues derivable therefrom which are and would be large and profitable, or else to accept divisions of the rates on both railroad fuel coal and other coal under tariffs of through rates applicable to both which will give your petitioners as originating or intermediate carriers compensation for carrying both classes of traffic much lower than they are now receiving and would but for said order of the commission continue to receive. Such loss in net revenues will in either case

amount to many thousands of dollars to your petitioners. Moreover, as your petitioners are informed and believe, the observance of the commission's said order will occasion heavy loss to some producers and shippers of railroad fuel coal who have sold such coal under contracts for future delivery f. o. b. cars at junction points to which your petitioners' present tariffs fix rates on such coal. The general readjustment of business as between producers and shippers of coal from the several coal regions served by your petitioners and other carriers which the observance of the commission's said order will necessitate, will cause great and irreparable loss and damage as your petitioners are informed and believe, to a large number of producers and shippers who are dependent on the railroad fuel business to enable them to operate their mines at all. The general business in
10 coal is extremely dull at this time; and the lack of demand will, as your petitioners are informed and believe, make it impossible for such producers and shippers to replace the railroad fuel business lost by general business.

Wherefore, your petitioners pray that a final decree may be entered herein enjoining, setting aside, and annulling said order of the Interstate Commerce Commission, dated the twenty-fourth day of February, 1911, and further that a temporary injunction may issue herein enjoining or suspending said order and any and all proceedings thereunder pending a final determination of this proceeding; and that your petitioners may have such other and further relief as to the court may seem proper.

And your petitioners will ever pray.

HUGH L. BOND, JR.,
GEORGE F. BROWNELL,
GEORGE STUART PATTERSON,
CLYDE BROWN,
WILLIAM M. DUNCAN,
Solicitors for Petitioners.

Dated Baltimore, April 27th, 1911.

11 STATE OF MARYLAND, *City of Baltimore, to wit:*

This day personally appeared before me, the undersigned, H. M. Matthews, who being by me first duly sworn, deposes and says that he is the general coal and coke agent of The Baltimore and Ohio Railroad Company, one of the petitioners named in the foregoing petition; that he knows the contents thereof, and that the facts and allegations in said petetion contained are true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

H. M. MATTHEWS.

Subscribed and sworn to before me this 27th day of April, 1911.

[NOTARIAL SEAL.] GEO. W. HAULENBEEK,
Notary Public.

My commission expires May 1, 1912.

12

EXHIBIT A.

No. 3053.

In the Matter of Restricted Rates.

[Submitted November 3, 1910. Decided February 24, 1911.]

1. The commission adheres to its ruling that "a tariff providing for reduced rates on coal used for steam purposes, or that the carrier will refund part of the regular tariff charges on presentation of evidence that the coal was so used, is improper and unlawful—that is to say, that the carrier has no right to attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate."
2. It also adheres to its ruling that "a carrier, or a person or corporation operating a railroad or other transportation line may not, as a shipper over the lines of another carrier, be given any preference in the application of tariff rates on interstate shipments, but it may lawfully and properly take advantage of legal tariff joint rates applying to a convenient junction or other point on its own line, provided such shipments are consigned through to such point from point or origin and are, in good faith, sent to such billed destination."
3. Carriers ordered to cease and desist from maintaining tariffs which contain rates applicable only upon shipments for a particular consignee or when the commodity transported is for a particular use, or rates that are restricted to the use of certain shippers and not open to all shippers alike.

John H. Marble for the commission.

George S. Patterson for Pennsylvania Railroad Company.

William Irvine Cross and W. A. Parker for Baltimore & Ohio Railroad Company.

W. M. Duncan for Wheeling & Lake Erie Railroad Company.

R. W. Davis and Samuel M. Havens for Buffalo, Rochester & Pittsburg Railway Company.

C. B. Heiserman and Jas. P. Orr for Pittsburg, Cincinnati, Chicago & St. Louis Railway Company.

13 Guy Wellman and Harry I. Miller for Buffalo & Susquehanna Railway Company.

Frederick W. Frost for Pittsburg, Shawmut & Northern Railroad Company.

H. A. Taylor for Erie Railroad Company.

Report of the Commission.

Clark, Commissioner:

In the territory east of Illinois and north of the Ohio River carriers quite generally have followed the practice of filing and using tariffs which named rates for the transportation of coal when for railroad

use lower than the rates applicable to the transportation of commercial coal between the same points. The underlying question has been before the commission in various forms many times and this proceeding was instituted by the commission for the purpose of considering it at this time and in a formal way. The Pennsylvania Railroad Company and the Baltimore & Ohio Railroad Company were made defendants to this proceeding, but numerous other railroads have intervened, so that most of the coal-producing railroads in the east are parties, as well as some railroads which do not originate their own fuel supply.

The tariffs referred to vary greatly in their definition or description of the transportation covered thereby. Sometimes it is provided that the rate will apply to coal when consigned to a particular junction point to a named railroad company, sometimes when for use upon the locomotives of a named railroad, sometimes when for railroad purposes. The question for consideration, therefore, is whether or not a railroad may grant rates applicable to the transportation of property consigned to a railroad company, or for railroad use, different from the rates contemporaneously applied to the transportation of the same commodity between the same points when consigned to or for the use of others than railroad companies.

In February and November, 1908, the commission issued the following conference rulings:

14 "A tariff providing for reduced rates on coal used for steam purposes, or that the carrier will refund part of the regular tariff charges on presentation of evidence that the coal was so used, is improper and unlawful—that is to say, that the carrier has no right to attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate.—Rule 34 of Conference Rulings Bulletin No. 4.

"A carrier, or a person or corporation operating a railroad or other transportation line, may not, as a shipper over the lines of another carrier, be given any preference in the application of tariff rates on interstate shipments, but it may lawfully and properly take advantage of legal tariff joint rates applying to a convenient junction or other point on its own line, provided such shipments are consigned through to such point from point of origin and are, in good faith, sent to such billed destination."—Rule 225, Conference Rulings Bulletin, No. 4.

We now have for consideration the soundness of those conclusions.

As indicating the different phases of this question that have come to us it may be instructive to note that we have upon requests for rulings at different times held that a tariff which limited the application of the rates shown therein to shipments handled by steam power, thus excluding shipments handled by electric power, was unlawful; that where stock in one railway company is owned by another railway company, but both maintain separate organizations and report separately to the commission, they may not lawfully carry freight free for each other; that a passenger fare tariff offering

season excursion fares for schools and different fares between same points for societies was discriminatory; that property for use in eating houses maintained by carriers for passengers and employees may properly be regarded as necessary and intended for the use of such carriers in the conduct of their business, but that persons and commodities transported for use in serving others than passengers and employees of the carriers may not lawfully be carried except under regular tariff rates; that a carrier may not lawfully transport free or at reduced rates materials for building or repairs on a refrigeration plant built under contract with the carrier, but which also engages in commercial ice business; that the commission would not give its sanction to an arrangement for lease by an interstate carrier of trackage rights over a short connecting line to a quarry for the purpose of hauling from that quarry with its own crews and equipment ballast for use on its line, the arrangement being regarded as a mere device to evade the payment of lawful rates, which would necessarily result in unjust discrimination against other stone quarries on the line of the lessor road; that it is unjustly discriminatory against dealers on its line for an interstate carrier to operate a commissary car from which it furnishes and sells to its employees household supplies, wearing apparel, etc.

Apparently defendants do not contend that under the act to regulate commerce a railroad company as a shipper over the line of another railroad may claim or be accorded any preferential rates. They argue that the system of special fuel rates was adopted for the purpose of making the freight charges to the junction point specific and public, thereby putting coal operators on an equality with each other in bidding upon fuel contracts.

It is stated that it frequently happens that where the joint rate is the same from the mines in a given group the divisions of that rate between the carriers are different, depending upon which mine the shipment moves from, and that under a division of rates on a mileage prorate basis the division of the consuming road is greater on shipments from the nearest mine than on shipments from the more distant mines. Coal is generally bought by the consuming road f. o. b. the mine and, the quality of the coal being the same, obviously that railroad would pay more for coal at the mine from which its division of the rate would be greatest, its haul in either case being the same. This, it is argued, would give the near-by mine an advantage over more distant mines in the same group, while the price obtainable for commercial coal in the same market would be identical. It is stated that since the operators of these mines do not necessarily know the exact divisions of the joint rates they would not be on a parity with each other in seeking fuel contracts.

It is also argued that producers upon different lines of railroad often compete through the same junction point or points for the coal supply of a given railroad, and that inasmuch as divisions of joint rates are questions of barter between the carriers it is evident that even though the rates from points of production to the

coaling station upon a consuming road were the same, the divisions might be different and the cost of transportation to the consuming road differ. It is stated that in order that the operators in the different fields might know as to the relation of rates from those fields the system of special fuel rates to the junction points was adopted. Defendants' witnesses testify that coal operators prefer a continuance of the present method of publishing these rates, but no operators appeared at the hearing to testify.

It is said that before the establishment of the present system of tariffs manipulations of various kinds under the old method of constructing rates had prevented the maintenance of the integrity of the rates. That, however, was at a time when "manipulations of various kinds" were epidemic and general.

Ordinarily the divisions of joint rates are not published and are subject to change by mutual agreement of the carriers. It is therefore suggested that a railroad might purchase its coal upon the understanding that it would make a certain division with the originating line different from that in effect at the time of the purchase, and that divisions might be altered for the purpose of varying the rate which the consuming road pays for transportation to the junction point.

The ingenuity of lawmakers has never yet produced a statute that was immune from evasion or violation, and we are not disposed to give too much weight to suggestions of possibilities of unlawful acts. The law requires publication, observance, and maintenance of definite transportation charges. A joint rate is published as an entirety. The divisions of that rate are subjects of agreement between the parties thereto, but each of them is bound by law to collect and retain neither more nor less nor different compensation than its established division of that rate. If a carrier's officers are disposed to violate the law under one method of publishing rates, it may be assumed that the same disposition would be present under another method of publication.

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It is stated that there is a competitive factor in the handling of railroad fuel coal which is not common to commercial coal, growing out of the fact that a railroad can receive coal intended for use upon its line at points widely separated. The Pere Marquette road is cited as an illustration. This road extends from Toledo, Ohio, where it connects with various coal-carrying roads from the Ohio, the Pennsylvania, and the West Virginia fields to Chicago, Ill., in the vicinity of which it connects with various lines serving the coal fields of Indiana and Illinois. It receives a considerable part of its coal supply at Toledo, and a portion of it from the Illinois and Indiana fields at its west-end junctions. It also draws a portion of its supply from mines in Michigan. It is therefore said that these coals from these different localities compete for railroad use upon the lines of the Pere Marquette, while they do not compete in commercial use; that is, that the coal from Illinois and Indiana does not, for commercial purposes, enter Toledo and does not there come into com-

petition with the Ohio and Pennsylvania coals, but that they do compete for use by that road at a point on the Perre Marquette midway between Chicago and Toledo. Obviously, coal from Chicago would not be brought to Toledo for commercial purposes, and it is equally obvious that it would not be hauled to Toledo for railroad purposes either. If the coal from Toledo and the coal from Chicago compete with each other for railroad purposes at a point midway between Chicago and Toledo they might in a relatively same degree compete with each other at the same point for commercial purposes.

On the practical side of this question it is seen that great quantities of coal are consumed by railroads. Some of the interveners assert that three-fourths of the product upon their lines is consumed
18 by railroads, and with all coal-producing railroads this traffic is large in volume. It is said that the chief advantage of the present system is that the rates on this enormous traffic are published and known to everybody, that all interested understand the exact transportation cost, that the foundation of the act to regulate commerce is that all rates shall be published and observed, and that it is desirable if possible to apply this idea to the transportation of railroad fuel.

Some of the interveners represent that the cost of their fuel would be increased if the present rates are not continued. The Erie Railroad furnishes an estimate showing that the cost of its coal would be greatly increased if it were obliged to obtain its supply upon the old system of divisions. This point is of no importance because taken at its full value it is but a question of division between the carriers of the total sum paid by the public. If the consuming road pays more, the producing road receives more. And, aside from all this, as will be pointed out, there is a lawful and simple method available under which the same results can be attained for the consuming roads, for the producing roads, and for the coal operators as are now reached.

It is stated that the purpose has been to make these special railroad fuel rates approximate the divisions which would be received out of joint rates if actually observed. Presumably, the producing roads have not established rates which yield them much less than they would obtain under the other system and the consuming road would hardly consent to the payment of rates substantially greater than under the divisions of joint rates.

As a practical objection to the present system it is urged that it might open the door to fraud, that under these tariffs the coal is entitled to the railroad fuel rate only when actually consumed by the railroad, and that if coal transported under these rates was later put to commercial uses it would have borne a different and unlawfully discriminating rate from that borne by other commercial coal. This suggestion is not of great weight, inasmuch as such deception
19 if practiced could be exposed and would invite the penalties provided in the act. It is suggested that the present system of rates unjustly discriminates between different consumers. Ordinarily the railroad does not compete with a private consumer of coal,

but it may happen that the railroad is a manufacturer in competition with private enterprises, and in that event its fuel so used would have borne a different rate from that used by the private factory.

It appears that these special fuel rates have been confined to coal used by steam railroads, and this is stated to be an unjust discrimination against electric railroads which are rapidly coming into general use and into competition with the steam railroads. In some instances, joint through rates and fares are in effect between steam and electric roads. It is difficult to see how unjust discrimination can be avoided if the coal-producing road gives a special fuel rate to another steam railroad and refuses to accord the same rate to an electric railroad that is in direct competition with the consuming steam railroad. The general impression presented in this proceeding seemed to be that no distinction could be made between steam railroad companies receiving coal from the same field at the same junction point, and that if any steam-railroad uses justified the special rates all steam-railroad uses might be embraced therein.

The objections from a practical standpoint to departing from the present system do not present any grave problems or any difficulties that can not easily be overcome. A carrier has an unquestioned right to haul its own property on its own rails at will. A joint rate between the producing road and the consuming road applying to a given point on the line of the consuming road, and out of which the producing road gets a division that is the same as its present special fuel rate, would yield the same results that are yielded by the present system. It is not an uncommon thing for carriers to file tariffs which show upon their face the divisions of the rates named therein, and if fuel coal were transported under a joint rate and the tariff showed the division of the rate there would be just as much publicity and general knowledge as to the charges of the producing road as there is under the special-rate tariffs. The consuming road having hauled the coal to the point to which the joint rate applies can distribute it to its fuel stations via its own lines at will.

It is therefore apparent that as a practical matter there is no difficulty about bringing this system within the limits of the commission's expressed opinions hereinbefore referred to. It is said that these special railroad fuel rates when published are subject to review by the commission to the same extent as other rates, that if discrimination is found therein it can be removed, and that if the rate is excessive it can be reduced. The same statement applies with equal force to a joint rate under agreed divisions, whether such divisions are published or not. The commission can always require the filing of the divisions, and a joint rate under agreed divisions definitely fixes the lawful earnings of the parties to that rate.

The more important question here, however, is whether or not the special tariffs in question are lawful and whether or not they violate any of the provisions of the act to regulate commerce.

In Capital City Gas Co. v. C. Vt. Ry. Co., 11 I. C. C. Rep., 104, the commission held that the maintenance of a rate on coal when intended

for "railroad supply," and maintenance at the same time of a higher rate between the same points on coal used for other purposes, constituted unlawful discrimination; citing Wight v. U. S., 167 U. S., 512, and Interstate Commerce Commission v. A. M. R. R. Co., 168 U. S., 144.

In In the Matter of Contracts of Express Companies for Free Transportation of their Men and Materials over Railroads, 16 I. C. C. Rep., 246, the commission held that a railroad company may lawfully transport men and supplies of an express company without reference to any tariffs when they are employed or used in the business of the express company upon the line of that railway, but that the railroad company may not lawfully transport men and
21 supplies of the express company when they are employed or used in the business of the express company at points not on the line of that railroad. It was there said:

"These contract provisions as applied to such off-the-line business are in violation of the statute because the carrier is transporting these men and supplies without the publication of a tariff and at a rate different from that provided for the general public. Any contract in effect even if valid when entered into must become invalid under the act to regulate commerce:"
citing I. C. C. v. C. & O. Ry. Co., 200 U. S., 361.

In Hitchman Coal & Coke Co. v. B. & O. R. R. Co., 16 I C. C. Rep., 512, the commission held that there was no warrant in the common law for the theory that a carrier as a shipper over the lines of another carrier may enjoy or be given a preferred status; that there is no intimation in the act to regulate commerce that a carrier as a shipper has or may be given a status different from or more advantageous than that given to all other shippers, and that the practice between carriers of according to each other preferential rates can not be upheld without removing the corner stone of the act which seeks to abolish undue preference and unjust discrimination. In this case it appeared that the defendant, the Baltimore & Ohio Railroad Company had rates on coal from the Moundsville district to Cleveland of $1 per ton when for commercial purposes; 98 cents per ton when for vessel fuel; 88 cents per ton when for fuel cargo; and from Bellaire, Ohio, directly across the Ohio River from the Moundsville district, 65 cents per ton when for railroad purposes. In that case the complaint came from a coal company, and it appeared that it was charged $1.25 per ton on its shipments to Toledo, while coal from the same and other districts was carried to Toledo for 97.5 cents per ton for use of steam railroads.

Section 2 of the act prohibits receiving directly or indirectly by any device whatsoever a greater or less compensation for
22 transportation for one person than for another person for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The courts have repeatedly held that the words "substantially similar circumstances and conditions" relate solely to

questions of transportation or haulage. In Wight v. U. S., 167 U. S., 513, where a railroad undertook to differentiate its service for two shippers upon the strength of differing conditions at the shippers' respective warehouses, the Supreme Court held that the circumstances and conditions referred to in section 2 of the act are those only which affect the transportation, and said:

"It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor."

In Pennsylvania R. R. Co. v. International Coal Mining Co., 173 Fed., 1, the court affirmed the judgment of the lower court awarding damages because the plaintiff had been charged a higher rate on so-called "free coal" than others had been charged on so-called "contract coal." The court said:

"The law having in view the carriage of freight and equal rates to all, it is clear to us that the words 'substantially similar circumstances and conditions' as used in this subsection (section 2 of the act) are those which affect transportation and not those which involve personal conditions or contractual relations between one particular shipper and the carrier, but are such things only as are circumstances of carriage generally. * * *

"In this case the railroad charged to one shipper a rate of haulage, and the coal of the other shipper being hauled from the same initial locality to the same terminal point the haulage was identical, and therefore the freight should be the same."

In Mitchell Coal & Coke Co. v. P. R. R. Co., 181 Fed., 403, plaintiff was awarded judgment because of unlawful discrimination against it and in favor of other shippers, the discrimination being in allowances given to other shippers ostensibly for the use of their tracks. It
23 was there held that the words "contemporaneous service" as used in section 2 of the act cover the time during which the discriminatory rates or practices remain in force. On this point the court said:

"In my opinion the well-known evil aimed at in section 2 requires the court to hold that the implied term in the comparison is the offending rates, making the word to mean 'at the same time with the offending rates,' and that as long as these rates remain in force the service rendered to a complaining and to a favored shipper are 'contemporaneous' within the meaning of the statute."

It is suggested that these special fuel rates are analogous to export and import rates, and the Pittsburg Plate Glass case, 13 I. C. C. Rep., 87, and the Import Rate case, 162 U. S., 197, are cited in that connection. We are not prepared to admit that analogy, but even if it does exist, the export and import rates are open and available alike for all shippers, while the rates here considered are restricted in their use to certain shippers or are conditioned upon the commodities being

put to a certain use. In the Import Rate case, supra, the sole question was whether or not carriers subject to the jurisdiction of our act might charge less for transportation import traffic than on the same commodity transported between the same points when it was not imported. The Pittsburg Plate Glass case, supra, presented the same issue, and was dismissed without prejudice on the strength of the decision of the Supreme Court in the Import Rate case, supra.

It is urged that the conditions under which this coal for railway fuel purposes is transported are different from those which surround the transportation of commercial coal. The distinction pointed out, however, goes only to the difference between hauling this railway fuel coal to the junction point and there turning it over to the connecting line and hauling commercial coal to the same junction point and making delivery to commercial consignees. We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local
24 rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination. Defendants' witnesses testified that the service rendered on the fuel coal that goes beyond the junction point is the same as that rendered on the commercial shipments that go beyond the junction point. One intervener suggests that the average point of consumption may call for practically the same service.

There can be no substantial difference in the conditions of transportation of this railway-fuel coal from a point on the producing line to a point on the consuming line as compared with the transportation of commercial coal between those same points. There may be slight differences in the terminal service required at destination, but that is true as to all shipments to any point of importance. It requires more, and somewhat more expensive, service to deliver one shipment than to deliver another, but that difference is not at all recognized in the rates, which are the same. The difference in transportation conditions must be substantial in order to remove the application of section 2 of the act. If a lower rate upon railway fuel coal is warranted because the railroad has facilities for receiving coal which make the cost of the service less, any shipper who provided like facilities must be entitled to the same rate accorded the railway. Obviously we should not permit a lower rate to a large shipper who has provided facilities for the prompt unloading of his traffic than is at the same time accorded to his smaller competitor who is not able to provide and who does not need such facilities. If that were done and it were finally held that it did not constitute violation of section 2 of the act, it would constitute clearly unjust discrimination in violation of section 3 of the act.

One intervening carrier finds justification for the special tariffs by saying: "Railroad fuel is consigned to a carrier having transportation facilities of its own. This element is lacking in commercial coal, whether consigned to an industry or to an interurban com-

25 pany." It is a matter of common knowledge that interurban electric railways frequently haul materials and supplies for their own use and that in many instances they engage in hauling freight for shippers. It might easily be that a large shipper might have or provide himself with "transportation facilities of his own." Would that fact entitle him to special and preferential rates at the hands of carriers that are amenable to the act to regulate commerce?

This intervener also says: "Nor can the transportation service performed by an interurban electric line be treated similarly to that performed by a steam railroad, because there is a well-defined distinction between a steam railroad and an interurban railroad (the latter usually being classed as a street railway), based upon the character of the service rendered, justifying a distinction between their respective corporate powers and duties." We can not concede that a carrier may base its charges for transportation upon a consideration of the respective corporate powers and duties of consignees.

Defendants say that electric roads should not be accorded the same rates as the steam roads, because "they do not carry coal either as common carriers or otherwise." If there be a steam railroad and a competing electric railway from Toledo, Ohio, to Grand Rapids, Mich., and the one has a coaling station and the other a power house at Jackson, Mich., and the Wheeling & Lake Erie Railroad provides in its tariffs that it will haul coal from Wheeling, W. Va., to Toledo, for the steam railroad to use at Jackson, at a certain rate, and that it will not accord the same rate to the electric railway, it thereby creates not only the unjust discrimination forbidden by section 2 of the act, but also the undue and unreasonable preference that is forbidden by section 3 of the act.

It appears that about 5 per cent of the fuel coal is used at the junction points, and to that extent the service is substantially the same as on local commercial coal to that junction point, although the rate is materially lower on the fuel coal.

It is argued that the railway fuel rate is in effect a propor-
26 tional rate up to the junction point. It is not, however, tendered as a proportional rate applicable on business going beyond. A proportional rate like any other rate should be open to all shippers. These special tariffs offer transportation between named points in the same manner that transportation is offered to shippers under regular tariffs, the only difference being the restriction as to the consignees and as to the uses of the commodity.

Defendants say that "the naming of those consumers describes a kind of traffic, the naming of the consumer connoting a movement of the coal after the termination of the rate that completely differentiates the traffic." Again we ask, Is the shipper who is prepared to give his shipments further movement with his own facilities entitled to lower rates than the shipper who is not so prepared?

The case of Worthington, Receiver of Wheeling & Lake Erie Railroad v. R. R. Com. of Ohio, cited by defendants, does not seem to have any real bearing here, as in that proceeding the question was whether

or not the traffic was interstate. The special rate on lake cargo coal was cited as evidence of the interstate character of the traffic.

The decision of the Indiana commission in an inquiry similar to this one was made under a statute different from ours, and great weight was given to the interests of Indiana mines and citizens as compared with competitors in adjoining coal-producing States.

It is said that the consuming carriers furnish a large part of the equipment in which the fuel coal is loaded; that the producing carrier pays only the per diem charge on that equipment, and that this fact justifies the difference in the rates. Would it be held that the shipper who furnishes at a low rental cars in which to move his shipments may have special and preferential rates upon his shipments? Must not the carrier that accepts or arranges for the use of equipment not owned by it use that equipment in such way as to avoid unjust discrimination, just as it must use its own equipment in a nondiscriminatory way?

27 Obviously if a carrier as a shipper over the lines of another railway may be accorded preferential rates on its fuel the same rule must extend to all other supplies purchased and shipped by railroads. As an example of how this would probably work out we will assume a railroad at Chicago that desires to purchase for its own use a large quantity of lumber. It may secure that lumber from Oregon or Washington or from the yellow-pine fields of the South. The commercial rates on lumber from these widely separated and important fields to Chicago are adjusted with regard to competition between points of production, between carriers, and between markets. If the railroad is required to pay the same rate that any other shipper would pay it is not able to create any unjust discrimination. If, however, it may have special rates on its lumber because it is a railroad, it, like any other shipper, would use the fact that it had a large tonnage to move as a leverage with which to secure the most favorable rates possible. It would then become a question of arrangement between it and other railroads as to which would give it the most advantageous rate, and the bargain which it was so able to drive would determine whether it would buy the lumber in the northwest, in the southwest, or in the southeast. Its favored rates would create unjust discrimination between localities and between persons having lumber for sale.

There are few commodities that are not purchased and used directly or indirectly by railroads, and if a railroad were accorded special or favored rates as compared with other shippers discriminations such as that cited would be injected into almost every field of commerce and nearly every locality of production or manufacture.

The tariffs which contain rates applicable only to the shipments of certain consignees or when a commodity is put to a particular use and the rates which are so restricted to the use of certain shippers and not open to all shippers alike are in violation of section 2 of the act, and unjustly discriminatory in violation of section 3 of the act, and therefore unlawful.

28 An order will be entered requiring defendants and interveners to cease and desist from such violations of the statute.

Prouty, Commissioner, dissenting:

I agree that the rate can not be varied according to the use to which an article is put; that a rate must be open to the whole public and can not be confined by its terms to an individual or a class; that a railroad can not be accorded a lower rate simply because it is a railroad; but I think that the movement of coal for railroad fuel supply so differs from the movement of coal for private use that a different system of rate making may properly be applied to its transportation.

My thought will be best understood by referring to the system which the commission thinks should be observed, in comparison with the system now in force, and which the defendant railways desire to continue.

All traffic must move under some published rate, and this applied to property owned by a railroad when moving over another railroad. Ordinarily, a railroad does not consume its coal at the junction point where it receives it from its connection, but hauls it to some other point upon its line, where it is taken from the cars for use upon its locomotives or for other consumption. If a private individual shipped coal from the mine to this consuming point, the rate charged would usually be a joint through rate materially less than the same rates up to the junction point plus the local rate of the consuming road to the point of consumption. Now, the commission holds that a railroad may bill its coal to the consuming point at the rate which a private shipper would pay. Since the joint through rate is usually so divided between the producing road and the consuming road that the amount received out of it by the producing road is less than the local rate from the mine up to the junction point is results that by this process the consuming road obtains its freight for less than it would had the traffic been billed to the junction point and received by it at that point. Otherwise stated, the rate upon which
29 this coal moves to the rails of the consuming road is the division of the producing road.

To this system, in practical operation, the defendants urge several objections:

1. The railroad generally buys its fuel f. o. b. the mine. The rate which it pays from the mine to the junction point is the division of the joint rate. That division is a matter of contract between the two roads. It is not published and is not, therefore, necessarily known. It may be changed from day to day without notice to anyone. Coal operators who desire to sell for fuel supply complain that under this system they do not know, and can not know, what the rate is, nor whether that rate will be maintained, nor, if the rate is an unfair one, can they apply to this commission for its correction. It is further urged that there frequently has been and that there always will be more or less manipulation in these divisions, with the result that certain mines or certain lines of railway will be preferred.

The answer of the commission to this division is that it may require from the carrier a statement of its division. We may undoubtedly require carriers to inform us of their divisions and to state from time to time any changes in those divisions; but the divisions themselves are not a part of the rate which carriers are required to publish. If they were published there is no requirement which will prevent their change at the will of the carrier. This commission has no jurisdiction to fix these divisions except in case of a joint rate established by it where the carriers have failed to agree between themselves upon the division.

It seems clear to me that under the system which the commission says must be followed the actual rate upon which this traffic moves never can be known; that this rate may be changed from day to day, and that it is entirely beyond the power of the commission to correct it, if wrong. All this follows, of necessity, from the fact that whatever the theory of the case may be, in actual practice the rate upon which this traffic moves is the division of the producing carrier up to the junction point.

30 2. Assuming that there were any method by which this division could be made public, by which its observance could be secured and by which it could, if unjust, be corrected, there are still serious objections to that system, which will be best shown by reference to the following diagram:

AB is the consuming road and D the point of consumption. BC is the producing road. Y and Z are mines upon the extreme limits of a group. It is 100 miles from D to B, 50 miles from B to Y, and 25 miles from Y to Z.

As is almost universally the case with coal tariffs, there is a group rate from Y-Z to D, which in this case is $2 per ton, and this rate is divided between the railroads AB and BC upon a mileage basis. Upon each ton of coal originating at Y, AB would receive $1.33\frac{1}{3}$ and BC $66\frac{2}{3}$ cents, while upon a ton of coal originating at Z, AB would receive $1.14 2/7 and BC 85 5/7 cents. If, therefore, AB buys its fuel coal of the mine Y it pays for its transportation to B $66\frac{2}{3}$ cents per ton, while if it buys its fuel coal at Z it pays for its transportation to B 85 5/7 cents per ton. Consequently, AB obtains its coal 19 cents per ton cheaper if it pays the same price to the mine at Y as it pays at Z. Since this is a very handsome profit in the mining of coal it is evident that Z can not compete with Y for the fuel supply of AB.

31 Now, what these carriers desire to do is to make a group rate from Y to Z, somewhat greater than $66\frac{2}{3}$ cents, and somewhat less than 85 5/7 cents, which will put the entire group upon the same competitive basis with respect to the fuel supply of the road AB which that group occupies with respect to private consumption at point D.

If, now, we add another producing railroad, AE, and consider shipments from mine O as compared with shipments from mine Y, we have another situation. The distance from D to A is 50 miles

and from A to O 100 miles. From O to D the distance is therefore the same as from Y to D, and the rate from these two mines to D for private consumption is also the same. Out of a rate of $1.50 per ton the road AB obtains $1 when the coal originates at Y and 50 cents when it originates at O; that is, if it purchases its fuel at Y it would pay 50 cents per ton for delivery upon its rails, while if it purchased at O it must pay $1 for that service. While AB will pay something more for its coal at A than at B, since its own haul from B is somewhat greater, still there would be nothing like the difference expressed in the difference of these divisions, and what the railroads desire in this case is to make such a rate from O to A, in comparison with the rate from Y to B, as will give the mine O the same opportunity to compete for the fuel supply of AB which they enjoy in competing for private supply at point D.

The figures above given are extreme, but the situation illustrated runs all through these coal regions and is of vast importance. Some producing coal roads handle nearly or quite one-half the entire output of their mines for railroad fuel supply. In case of many mines more than one-half the output goes to that purpose, and whether a mine shall exist is often determined by whether it can furnish railroad fuel.

The system which the railroads now have in effect was first established at the request of the operators, but is now approved by all parties concerned, the operators, the producing road, and the
32 consuming road. It is universally recognized that in no other way can the actual rate of transportation be known. In no other way can its maintenance be assured, and in no other way could it, if wrong, be corrected by public authority.

The purpose of the act to regulate commerce is to facilitate, not to impede, commercial operations. When shippers and railways unite in asking that a particular thing be done, when that thing is manifestly for the interest and convenience of all parties, when no harm can result, but when, upon the contrary, the fundamental purposes of the act will be promoted, I think we should, if possible, put such a construction upon this statute as will permit it.

It does not seem to be seriously claimed by the majority that the present method of publishing these fuel-supply rates is attended with any practical wrong, but it is said that the second section of the act peremptorily forbids it and that it is therefore unlawful and must be so declared by us.

The second section provides that where the service is like and contemporaneous, the traffic of a like kind, and the circumstances and conditions under which the transportation occurs substantially similar, the rate shall be the same. The majority hold that a railroad stands like any other shipper and that to accord one rate when the shipment is for a railroad and another rate when it is for a private individual is to violate that section. I concede this to be so if the only difference in the transaction be that the freight money is in one case paid by a railroad company and in the other case by a private party, but I think that there are other incidents of the transaction

arising out of the circumstance that this fuel is for railroad supply and is received at the junction point by a railroad, which excepts the case from the operation of the second section.

To understand just what is meant, look at the diagram above given. The rate now published from Y to B when the coal is for railroad-fuel supply is less than the rate for a private shipment delivered at B. Now, it is urged that since the transportation between these points may be at the same time and in the same train it is prohibited
33 by the second section to charge one rate for the car of private coal and a different rate for the car of public coal.

It is said that the Supreme Court of the United States in the Wight case, 167 U. S., 512, held that the words "circumstances and conditions," as used in the second section of the act, refer exclusively to the service of transportation and that in order to make out a dissimilarity of circumstance and condition under that section it is necessary to show a different transportation service. I am not prepared to admit that such is the fair interpretation of that case as applied to a set of facts like those now before us; but assuming that it is, nevertheless it seems to me that upon the strict rule of that case as so construed the circumstances and conditions attending the transportation of this fuel coal substantially differ from those under which private coal is handled.

The transportation of the private coal from Y to B involves a delivery at B. To affect this, tracks must be provided upon which that delivery can be made, and the shipper must be given a certain length of time, usually 48 hours and sometimes more, in which to unload his coal. Upon the other hand, delivery of fuel coal is made upon the exchange track of the common carrier for whom the coal is intended, and no use of the car is involved, since as soon as the car is placed upon the exchange track at the service of the connecting carrier, that carrier accounts for the use of the car to its owner and relieves the railroad handling the coal from Y from that burden. It is perfectly evident, therefore, that the carriage and delivery of the fuel coal costs the producing carrier less than that of the private coal. Here, therefore, is a difference in circumstance and condition which takes the case from the operation of the second section.

It is suggested that the comparison ought to be between the transportation from the mine to the point upon the consuming road where the coal is finally consumed. If this were so the delivery to a private individual is not analogous to that taken by the railroad company itself at the point of consumption, but, certainly, it can not
34 be true that the consuming railroad must handle this traffic upon its own line under a published tariff. It may receive it at the junction point and subsequently transport it over its own rails without reference to any tariff rate.

It is said that if this be so, then carriers might make a lower rate in favor of any shipper who would provide tracks and other facilities for the speedy unloading of coal, and that the effect of such

rates would be to throw the handling of coal into the hands of large operators who could provide such facilities. Our second section is essentially a reenactment of the English equality clause, and if our court follows in the interpretation of that section, the lead of the English court in its treatment of the equality clause, it must hold that where the cost of transportation and delivery is less a difference in rate is not forbidden. This is well shown by reference to Denaby Main Colliery Co. v. M. S. & L. Ry. Co., 11 App. Cases, 97.

The defendant railway company was engaged in transporting coal from the South Yorkshire field to the port of Grimsby. At that destination team tracks had been provided by the defendant for the delivery of its coal, and the complainant colliery company took delivery of its shipments upon these team tracks.

Bannister, a competitor of the complainant, had provided at Grimsby yards with tracks and various facilities for the unloading of coal, and it was found that the cost to the defendant of delivering coal into the yards of Bannister was less that the cost of delivering upon its team tracks to the complainant. Under these circumstances the court held that the equality clause of the English act did not apply, but that since the cost of the service to the defendant was less in the case of Bannister than in the case of the complainant, a lower rate might properly be made to him.

If our court holds, as it apparently has indicated in the Wight case, that difference of circumstances and conditions may be shown by showing the difference in cost of service, it is difficult to see how it can avoid the conclusion that, when the cost of service for any reason is less in transporting the freight of one person than in transporting that of another, the second section does not apply. It should be borne in mind that the third section may prevent the making of the lower rate, even though it be lawful under the second. The prohibition of the second section is absolute within the sphere of its operation. If the service is like and contemporaneous, the kind of traffic like, and the circumstances and conditions of the transportation the same, then the rate must also be the same. The third section is more elastic. It forbids undue discrimination or advantage, and it is for us to say, upon consideration of all the facts, whether that section has been violated.

It seems to me, therefore, that the circumstances and conditions attending the transportation and delivery of this fuel coal are different from those under which private coal is handled, and that for this reason the second section does not forbid the making of different rates for the different services, and if this be so then the second section has no application whatever. I think, however, that there is a broader and more fundamental ground upon which the operation of that section can be distinguished. This fuel coal is not, to my mind, a like of traffic with private coal nor is its carriage a like service within the meaning of that section. Even though the physical service performed be exactly the same it is not a violation of the second

section upon the part of the carrier to demand and receive a different compensation for that service.

If we were to follow the history of a dozen cars of coal taken on at the same mine, moving in the same train, and delivered at B upon the same track to its connection we might find that the carrier received a different rate for every car. It is true that this difference in compensation might be due to the fact that the traffic was intended for different points and that the division of the carrier differed according to the destination of the shipment, but it is also true that carriers habitually make what are known as proportional rates up to
36 the junction point which are less than the local rate. Traffic handled upon through rates or upon proportional rates is not a like kind of traffic with that which begins at the mine and ends at the junction point, nor is the service a like service, and even though the cost of the transportation is precisely the same the carrier may impose a different charge.

The fact that this fuel coal is to be consumed at some point beyond the junction; that from the junction point it is carried by the railroad which is to consume it, and which is or may be entitled to a division of the through rate to the point of consumption, gives this business traffic incidents which do not attach to ordinary private coal. It is this fact which renders it impossible to know the rate upon which the fuel coal is handled; to compel a publication and maintenance of that rate; or to control the rate by Government authority. This business is closely analogous to expert and import traffic.

It is well understood that the rate applied on certain commodities when for export is lower to nearly if not all ports of export in the United States and Canada than when for domestic compensation. It may be true that in most instances the physical incidents of the transportation are somewhat different in the case of the export than of the domestic business, but this is not the broad ground upon which the lower rate is justified. It is because the carriers in the treatment of this export traffic may consider the point of origin, the point of final destination, the possibility of transporting this traffic by different avenues, the fact that the commodities transported must compete abroad with similar commodities produced in other countries which justifies the lower export rate. If it should turn out in some individual cases that the cost of handling business was exactly the same, whether for export or for home consumption, still the export rate would undoubtedly be sustained. To deny carriers the right of maintaining lower export tariffs than apply to domestic business would shut up two-thirds of the ports of export in the United States.

Exactly the same thing is true, and for exactly the same
37 reason, of imports. This business may move from the port to the interior destination in the same train and for precisely the same expense as domestic traffic, but it need not for that reason bear the same rate. It is not a like service. This is well pointed out in the Pittsburg Plate Glass case, 13 I. C. C. Rep., 87, in which the commission said:

"Transportation from a seaport of the United States or an adjacent foreign country to an interior American destination in completion of a through movement of freight from a port of a foreign but not adjacent country, whether upon a joint through rate or upon a separately established or proportional inland rate applicable only to imports moving through, is not a 'like service' to that of the transportation independent and complete within itself of traffic starting at such domestic port, though bound for the same destination.

"It is true the court held in the case of Wight v. United States, 167 U. S., 512, that the existence of competition did not create 'dissimilar circumstances and conditions' such as to justify discrimination as defined in the second section. But this referred to unjust discrimination as between different shippers over the same line in the performance of a 'like service,' and, as we have seen, the transportation of import traffic from the port of entry to an interior destination in completion of a through movement from a point in a foreign country is not a like service to that involved in the transportation of domestic traffic originating at such port, even where the transportation in all other respects is performed under like conditions.

"It follows that the charge of unjust discrimination in violation of section 2 of the act is not sustained."

The lower import rate has been expressly approved by the Supreme Court of the United States in the Import Rate case, 163 U. S., 197. In that case the traffic originated at Liverpool and was intended for San Francisco. It moved to New Orleans by water and from New Orleans to San Francisco by rail. The amount received by the rail carrier was materially less than the rate for the transportation of exactly the same articles from New Orleans to San Francisco, but the court held that this was not prohibited by the act to regulate commerce. The court held in that case that the import traffic was not a like kind of traffic with that originating at the port of import.

38 So here it seems to me that when all the circumstances which surround this fuel-coal traffic are considered it is not a like kind of traffic, under the second section, with coal transported for private consumption, nor is the service a like service, and while there may be to-day grave doubts as to the final decision my belief is that the Supreme Court should and will finally so hold. I can see no other theory upon which rates which are vital to the handling of the business of this country can be justified.

The second section is directed against discrimination between shippers. To charge one person one rate and another person another rate for the performance of exactly the same service is a wrong which that section was intended to prevent. But there is no wrong when the private consumer who receives his coal at B is charged a different rate for the transportation from Y than is imposed for carrying railroad coal from Y to B and there delivering it to the connecting railroad for use at the various points upon its line. The wrong

does not exist, because the service is not the same, and since there is no wrong the statute ought not to be so construed as to impose a penalty.

It is suggested that if railroads be allowed to make special rates for the transportation of coal when for railroad use, the same privilege must be extended as to other railroad supplies; and this is probably true, although the convenience of the railways in seeking to avoid a multiplicity of tariffs, and perhaps the discretion of this commission, might to some extent limit the exercise of that privilege. I for one think it would be much better if all the principal railway supplies did move upon tariffs of this character.

In my opinion the method now in vogue leads to much evasion and discrimination. Our last annual report makes reference to two cases—United States v. M. & R. R. R. Co. and United States v. L. S. & M. S. Ry. Co.—in which fines were imposed for illegality in the transportation of company material. In each case the traffic was billed to that point where the best division could be obtained and stopped off at an intermediate point. While the fraud in these
39 two instances was detected and punished, there were probably hundreds of instances which escaped observation.

An examination of our correspondence files will show that trouble is constantly arising from the fact that the railroad bases the price for its supplies upon the division which it expects to obtain from the point of origin to the junction point, instead of upon the local rate up to that point. It is evident that carriers select for the billing point not that station at which the traffic is to be actually used but that at which the most favorable division can be obtained. To my mind it would be better on all accounts if carriers were required to publish a rate up to the junction point upon all railway supplies which move in very considerable quantities. Such a rate would be known to every one, would be paid by all alike, and could be corrected if discriminatory or unjust.

It is pointed out that these tariffs do not apply to fuel for the use of electric railroads, but only for steam railroads. The kind of motive power used can not, it seems to me, distinguish between different railroads in this particular, but this is not a reason for refusing to permit the publication of these rates. When attention is called to an actual discrimination of this kind, resulting from one of these tariffs, it can be and should be corrected.

40 Order.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 24th day of February, A. D. 1911.

Present: Judson C. Clements, Charles A. Prouty, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, commissioners.

No. 3053.

In the matter of restricted rates.

Respondents: The Baltimore & Ohio Railroad Company and the Pennsylvania Railroad Company. Interveners: Pennsylvania Company; Buffalo, Rochester & Pittsburg Railway Company; The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company; The Wheeling & Lake Erie Railroad Company and B. A. Worthington, receiver thereof; The Lake Shore & Michigan Southern Railway Company; The Pittsburg & Lake Erie Railroad Company; Buffalo & Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo & Susquehanna Railway Company; The Hocking Valley Railway Company; Erie Railroad Company; The Western Maryland Railway Company; The Pittsburgh, Shawmut & Northern Railroad Company and Frank Sullivan Smith, receiver thereof.

41 This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon:

It is ordered, That the above-named respondents and interveners be, and they are hereby, directed, on or before the 15th day of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from their present practice of maintaining and using tariffs on coal the rates in which are restricted to shipments of or for certain consignors or consignees, or when the coal transported is for a particular use.

It is further ordered, That said respondents and interveners be, and they are hereby, directed, on or before said 15th day of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from maintaining any rates on coal which are applicable only to the shipments of certain consignors or consignees, or when the coal transported is put to a designated use, and which rates are not open alike for all shippers.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled report and order of the commission are true copies of the originals now on file in the office of this commission.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the commission, this 24th day of March, 1911.

[SEAL.] EDW. A. MOSELEY, *Secretary.*

42 And afterwards, to wit, on the 28th day of April, 1911, a certain notice issued out of the clerk's office of said court, addressed to the Honorable George W. Wickersham as Attorney

General of the United States, which said notice, and the marshal's return of service thereof, are in the words and figures following, to wit:

NOTICE TO THE ATTORNEY GENERAL.

43 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; The Pennsylvania Company; Buffalo, Rochester and Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; The Wheeling and Lake Erie Railroad Company and B. A. Worthington, receiver thereof; The Lake Shore and Michigan Southern Railway Company; The Pittsburgh and Lake Erie Railroad Company; Buffalo and Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo and Susquehanna Railway Company; The Western Maryland Railway Company; The Pittsburg, Shawmut and Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners, } No. 39.

vs.

UNITED STATES, RESPONDENT.

The President of the United States:

To Honorable George W. Wickersham as Attorney General of the United States:

You are hereby notified that a petition has been filed in the above entitled case in the office of the clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served by filing said copy in the Department of Justice.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, presiding judge of the United States Commerce Court, this 28th day of April, A. D. 1911.

[Seal of the
United States Commerce Court.]

G. F. SNYDER, *Clerk.*

Original of above notice and copy of petition served upon Honorable George W. Wickersham, Attorney General of the United States, this 28th day of April, A. D. 1911. (Accepted by Blackburn Esterline.)

F. J. STAREK, *Marshal.*

44 And on the same day, to wit, on the 28th day of April, 1911, a certain notice issued out of the clerk's office of said court, addressed to Judson C. Clements as chairman of the Interstate Com-

merce Commission, which said notice, and the marshal's return of service thereof, are in the words and figures following, to wit:

NOTICE TO THE CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION.

45 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY; THE Pennsylvania Railroad Company, The Pennsylvania Company; Buffalo, Rochester and Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; The Wheeling and Lake Erie Railroad Company and B. A. Worthington, receiver thereof; The Lake Shore and Michigan Southern Railway Company; The Pittsburgh and Lake Erie Railroad Company; Buffalo and Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo and Susquehanna Railway Company; The Western Maryland Railway Company; The Pittsburg, Shawmut and Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners, } No. 39.

vs.

UNITED STATES, RESPONDENT.

The President of the United States:

To Judson C. Clements as chairman of the Interstate Commerce Commission:

You are hereby notified that a petition has been filed in the above-entitled case in the office of the clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served by filing said copy in the office of the Secretary of the Interstate Commerce Commission.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, presiding judge of the United States Commerce Court, this 28th day of April, A. D. 1911.

[Seal of the United States Commerce Court.] G. F. SNYDER, *Clerk*.

[Seal of the United States Commerce Court.]

Original of above notice and copy of petition served upon Judson C. Clements, chairman of the Interstate Commerce Commission, this twenty-eighth day of April, A. D. 1911.

F. J. STAREK, *Marshal*.

46 And afterwards, to wit, on the 8th day of May, 1911, there was filed in the clerk's office of said court a certain appearance, in the words and figures following, to wit:

APPEARANCE OF P. J. FARRELL, ESQ.

47 In the United States Commerce Court.

THE BALTIMORE & OHIO RAILROAD COMPANY et al., petitioners, v. UNITED STATES, RESPONDENT. | In Equity. No. 39.

Appearance.

To Mr. G. F. Snyder, clerk of said court:

I hereby enter herein the appearance of the Interstate Commerce Commission as a party respondent, and of myself as its solicitor.

Dated May 8, 1911.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Respondent.

48 And afterwards, to wit, on the 15th day of May, 1911, there was filed in the clerk's office of said court, in said entitled cause, a certain notice and motion of the intervening respondent, Interstate Commerce Commission, in the words and figures following, to wit:

NOTICE AND MOTION TO STRIKE BY INTERSTATE COMMERCE COMMISSION.

49 In the United States Commerce Court.

THE BALTIMORE & OHIO RAILROAD COMPANY et al., petitioners, v. UNITED STATES ET AL., RESPONDENTS. | In Equity. No. 39.

Notice.

Notice is hereby given that a motion to strike by the Interstate Commerce Commission, one of the parties respondent in the above-entitled cause, of which the annexed is a copy, has been filed with said court, and that at a session of the court to be held in the city of Washington, D. C., on the 17th day of May, 1911, at the opening of court on that day, or as soon thereafter as counsel can be heard, application will be made to the court for the relief in said motion prayed, and for such other and further relief as may be just.

Dated Washington, D. C., May 15, 1911.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Respondent.

50 To HUGH L. BOND, JR.,
GEORGE F. BROWNELL,
GEORGE STUART PATTERSON,
CLYDE BROWN,
WILLIAM M. DUNCAN,
JAMES A. FOWLER,
BLACKBURN ESTERLINE,
Solicitors of Record.

And to all other parties of record or in interest.

51 In the United States Commerce Court.

THE BALTIMORE & OHIO RAILROAD COMPANY et al., petitioners, v. UNITED STATES ET AL., RESPONDENTS. } In Equity. No. 39.

Motion to strike.

Comes now the Interstate Commerce Commission, one of the parties respondent in the above-entitled suit, and moves this honorable court to strike from the petition in said suit all of the sixth subdivision of paragraph 3 on page 5 of said petition, which reads as follows:

"These petitioners respectfully refer to their several answers contained in their Exhibit B herewith for further and more particular statements of the facts, circumstances, and conditions attaching to and affecting the said traffic in railroad fuel coal and the trans-
52 portation of the same, and pray that the statements of such facts, circumstances, and conditions in said answers be taken as part hereof."

And also to strike from said petition all that part of paragraph 4 on page 6 of said petition, which reads as follows:

"These petitioners file herewith, marked 'Exhibit B,' a duly certified copy of the order of the commission dated January 4, 1910, and the order amendatory thereof dated May 9, 1910, of the answers of the respondents, and of the testimony taken in the proceeding, all of which said Exhibit B these petitioners hereby refer to and make part of this petition."

And also to strike from said petition said Exhibit B.

And in support of said motion this respondent shows:

That in and by section 1 of the Commerce Court act of June 18, 1910, it is provided that "The jurisdiction of the Commerce Court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the Commerce Court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant the service shall be made by filing a copy of said petition in the office of the secretary of the Interstate Commerce Commission
53 and in the Department of Justice." That in the above-entitled suit the United States is named as a party respondent, and that in the only copy of said petition which was filed in the office of the secretary of the Interstate Commerce Commission and thus served upon this respondent, neither a copy of said Exhibit B nor a copy of any of the documents named therein was included.

That said order of January 4, 1910, is at the most only a matter of evidence; that said order of May 9, 1910, is at the most only a mat-

ter of evidence; that said answers are at the most only matters of evidence, and that said testimony is at the most only a matter of evidence.

That even as evidence said answers and said testimony are, and that each of them is, irrelevant and immaterial.

That this respondent is informed and believes, and thereupon avers, that said answers are six in number and aggregate 35 typewritten pages; that in many instances allegations contained in said petition, exclusive of said Exhibit B, are in substance the same as, although in phraseology different from, other allegations contained in said answers, and that in many instances allegations contained in one of said answers are in substance the same as, although in phraseology different from, each of the other answers referred to in said Exhibit B.

That for divers other causes appearing upon the face of said petition, said Exhibit B is not, nor is any of the documents named
54 therein, properly a part of said petition, but that the same are, and that each of them is, irrelevant and immaterial.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission, Respondent.

55 And afterwards, to wit, on the 19th day of May, 1911, there was filed in the clerk's office of said court by the petitioners in said entitled cause, a certain notice of motion and accompanying affidavits, in the words and figures following, to wit:

PETITIONERS' NOTICE OF MOTION AND AFFIDAVITS.

56 In the Commerce Court of the United States.

Notice of motion and affidavits.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Erie Railroad Company, Lehigh Valley Railroad Company, New York, Ontario & Western Railway Company, and The Pennsylvania Railroad Company, petitioners,
vs.
UNITED STATES, RESPONDENT.

May session, 1911. No. 39.

Please take notice that upon the petition and exhibits herein, the affidavits hereto attached, and the proceedings had and testimony taken in a certain proceeding before the Interstate Commerce Commission wherein these petitioners were defendants, being a proceeding of the Interstate Commerce Commission on its own motion, entitled "In the Matter of Restricted Rates," docket number 3053, a copy of which proceedings and testimony has been filed in the office of the secretary of the Interstate Commerce Commission, and one in the Department of Justice, a motion will be made herein

on the 23d day of May, 1911, at 10 o'clock in the forenoon that
57 day or as soon thereafter as counsel can be heard, at the court room of this court in the city of Washington, D. C., for an order restraining and suspending until the final hearing and determination of this action, a certain order of the Interstate Commerce Commission dated March 24, 1911, made in the said proceeding before the Interstate Commerce Commission, docket number 3053, and for such other and further relief as this court shall deem proper.

Dated, May 18, 1911.

HUGH L. BOND, JR.,
GEORGE F. BROWNELL,
GEORGE STEWART PATTERSON,
CLYDE BROWN,
WILLIAM M. DUNCAN,
Solicitors for Petitioners.

To the INTERSTATE COMMERCE COMMISSION.

To the Honorable GEORGE W. WICKERSHAM,
Attorney General of the United States.

58 In the Commerce Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., petitioners, *vs.* UNITED STATES, RESPONDENT.	May session, 1911. No. 39.

CITY OF BALTIMORE, *State of Maryland, to wit:*

Personally appeared on this eighteenth day of May, 1911, before the subscriber, a notary public of the State of Maryland in and for the city of Baltimore, Louis B. Brydon, and made oath in due form of law as follows:

That he is the president of the Foster Coal and Coke Company of West Virginia, owning Laurel Creek mine in the vicinity of Grafton, West Virginia; that his company is largely interested in the furnishing of fuel coal to railroads; that the entire output of the said mine is being delivered to the Lehigh Valley Railroad Company at East Penn Junction under a railroad fuel rate of $1.30 per ton, the commercial rate to said East Penn Junction being $1.95 per ton; that if the said coal must pay the commercial rate to East Penn Junction it will not be to the interest of the Lehigh Valley Railroad to take
59 coal from said affiant's mine; that the operation of the mine at this time being entirely dependent upon the said shipments to East Penn Junction, upon said change in the rate the mine would be compelled to shut down.

LOUIS B. BRYDON.

Subscribed and sworn to this 18th day of May, 1911.

[SEAL.] WM. D. POULTNEY, *Notary Public.*

60 In the Commerce Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., petitioners. *vs.* UNITED STATES, RESPONDENT. | May session, 1911. No. 39.

STATE OF OHIO,
County of Cuyahoga, to wit:

Personally appeared on this 15 day of May, 1911, before the subscribed, a notary public of the State of Ohio, in and for the county of Cuyahoga, Mr. William Harper, the secretary of the Morris Coal Company, and made oath in due form of law as follows:

That the said Morris Coal Company has a contract with the Grand Trunk Railway Company for the delivery to the said Grand Trunk Railway Company for its own consumption 35 cars of coal per week from the Cambridge Coal district of Ohio. That said coal is delivered at a fixed price to said Grand Trunk Railway, based on a fuel rate from said coal company's mines to Toledo, of 72½ cents per ton. That the commercial rate on coal from the Cambridge coal region to West Detroit is $1.15. That under the contract of the said Morris Coal Company with the said Grand Trunk Railway Company, the Morris Coal Company is obliged to protect the rate, and if the said fuel rate were cancelled the cost to the said Morris Coal
61 Company of delivering the coal at Toledo would be increased to the consequent loss of the said Morris Coal Company.

That the contract with the Morris Coal Company extends to the 31st day of March, 1912, and the said Morris Coal Company would be subjected to the said burden for the space of almost a year, and that it could not afford to pay said amount at the present price that it is getting for coal. That if said fuel rates were cancelled, not only would the said Morris Coal Company be subjected to the aforesaid loss during the life of its said contract, but, on the expiration thereof, its said coal would come into competition with other coal obtainable by said Grand Trunk Railway at other points upon its line under circumstances and conditions that would make it impossible for it to successfully compete. That on the west end of its line coal can be bought by said Grand Trunk Railway from the Illinois coal fields close to its own line.

Furthermore the said Grand Trunk Railway Company secures a large tonnage of coal from mines in northwestern Pennsylvania via Black Rock, as well as that moving across Lake Erie via car ferry which is in competition with coal purchased in Ohio fields for use on Grand Trunk lines in Ontario.

The cancelling of the said fuel rate would render the said Morris Coal Company powerless to compete for the business against the coal so described. That the Morris Coal Company made the contract to protect the said fuel rate in good faith, well knowing that fuel rates for railroad fuel coal involved no competition with commercial coal.

and had resulted in good to all classes using, carrying and selling coal, and having no reason to believe that they would ever be forbidden.

WILLIAM HARPER.

Subscribed and sworn to before me on the day and year first above written.

EDW. F. BOWLER, *Notary Public.*

62 In the Commerce Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., petitioners, *vs.* UNITED STATES, RESPONDENT.	May session, 1911. No. 39.

STATE OF MARYLAND, *City of Baltimore, to wit:*

Personally appeared this 13th day of May, 1911, before the subscriber, a notary public of the State of Maryland, in and for Baltimore city, Howard Adams, president of the S. M. Hamilton Coal Company, and made oath in due form of law as follows:

That the said S. M. Hamilton Coal Company ships coal from the Willard mine in the West Virginia region on the Baltimore and Ohio Railroad Company, between Clarksburg and Fairmont, W. Va., for the consumption of the Washington Southern Railway, delivering said coal at Potomac Yard near Washington, D. C. That said coal is sold under contract with said Washington Southern Railway Company, and at a price based on the railroad fuel rate to Potomac Yard. That the fuel rate upon said coal delivered at Potomac Yard is $1.34 and under the arrangement between said S. M. Hamilton Coal Company and said Washington Southern Railway
63 Company, the said railway company has the privilege of cancelling its said contract should said rate be changed. The commercial rate on the S. M. Hamilton Coal Company's coal to Potomac Yard is $1.90. The Washington Southern Railway Company can secure coal for the use of its locomotives from the line of the Chesapeake and Ohio Railway Company delivered at Doswell, Virginia; that coal can be delivered to the Washington Southern Railway, or, strictly speaking, to the Richmond, Fredericksburg and Potomac Railroad, which is a part of its system, at Doswell, Virginia, on a through rate for points on the Washington Southern Railway's own line between Doswell and Potomac Yard, including the latter point. The transportation of said coal between Doswell and points beyond, including Potomac Yard, would be over the Washington Southern Railway's own line, and the proportion of said through rate paid by it would be much less than the commercial rate of $1.90 on the S. M. Hamilton Company's coal delivered at Potomac Yard. The S. M. Hamilton Coal Company could not compete with such coal, and would lose the said traffic which constitutes a large part of its

business. On the other hand, the coal delivered by the S. M. Hamilton Coal Company to the Washington Southern Railway at Potomac Yard for its own consumption, does not and can not come into competition with the commercial coal delivered at said point.

HOWARD ADAMS.

Subscribed and sworn to before me on the day and year first above written.

[SEAL.] GEO. W. HAULENBEEK,
Notary Public.

64 In the Commerce Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., petitioners.
vs.
UNITED STATES, RESPONDENT.

May session, 1911.
No. 39.

STATE OF NEW YORK,
City and County of New York, to wit:

Personally appeared on this 13th day of May, 1911, before the subscriber, a notary public of the State of New York, in and for the city and county of New York aforesaid, John Delaney, manager of the Pittsvein Coal Company, and made oath in due form of law as follows:

That the mines of his company are located near Flemington, West Virginia, in the West Virginia coal region; that he ships coal largely from there delivered to the Lehigh Valley Coal Company at East Penn Junction, near Allentown, Pennsylvania, for use on the Lehigh Valley Railroad on its own locomotives; that the fuel rate on such coal to East Penn Junction is $1.30 per ton and the commercial rate to the same point is $1.95 per ton; that, if the coal of his company is compelled to pay the said commercial rate of $1.95 per ton to East Penn Junction, it will not be to the interest of the Lehigh Val-
65 ley Railroad Company to take coal from his company at all; that the said Lehigh Valley Railroad takes a certain quantity of coal off the Pennsylvania Railroad at Mount Carmel, near Northumberland, in Pennsylvania, and if it is compelled to pay an additional 65 cents upon the West Virginia coal shipped from this affiant's mine it will not be to its interest to take the same at all, in as much as a large part of the rate upon the coal coming to said Lehigh Valley Railroad at Mount Carmel, if shipped on through rate to other points on said Lehigh Valley Railroad, would be paid to the said Lehigh Valley Railroad Company itself and the division of the rate which that company would have to pay to Mount Carmel would be much less than the $1.95 commercial rate to East Penn Junction. The cancelling of the fuel rate to East Penn Junction would destroy the only condition that enables the said Pittsvein Coal Company's coal to compete with said coal from the Pennsylvania Railroad, and

would result in the loss to the Pittsvein Coal Company of a very large part of its business. That this is not a mere surmise of this affiant, but the agents of this company, Ernest Law & Company, were notified by the said Lehigh Valley Railroad Company when the said agreement was being negotiated that the said Lehigh Valley Railroad Company reserved the right to cancel said contract in case the freight rate to East Penn Junction was increased above the said $1.30 per gross ton, and this affiant annexes to this affidavit a copy of the letter received by said Ernest Law & Company from F. L. Blendinger, assistant to the vice president of said Lehigh Valley Railroad Company.

JOHN DELANEY.

Sworn and subscribed to before me on the day and year first above written.

C. W. BEAUCHAMP,
Notary Public in Kings County.

(Certificate filed in New York County—New York register's certificate No. 2081.)

66 [Copy.]

LEHIGH VALLEY RAILROAD COMPANY.
143 LIBERTY STREET,
New York, March 25th, 1911.

F. L. BLENDINGER,
Assistant to Vice President.

MESSRS. ERNEST LAW & COMPANY,
Harrison Building, Philadelphia, Pa.

GENTLEMEN: Your letter of March 24th, stating that you are sending the agreement for supply coal to your principal, the Pittsvein Coal Company, for execution, received. It must be understood that in case freight rates are increased above $1.30 per gross ton to East Penn Junction, we reserve the right to cancel the contract, as it will be cheaper for us to bring coal in via Mount Carmel than to pay higher freight rate.

Yours, truly,

(Signed) F. L. BLENDINGER,
Assistant to Vice President.

67 In the Commerce Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., petitioners. *vs.* UNITED STATES, RESPONDENT.	May session, 1911. No. 39.

STATE OF NEW YORK, *County of New York, to wit:*

Personally appeared on the 13th day of May, 1911, before the subscriber, a notary public of the State of New York, in and for the county of New York, Stephen B. Elkins, vice president of the Elkins

Coal and Coke Company, and made oath in due form of law, as follows:

That the Elkins Coal and Coke Company, whose mines are located in the West Virginia region, are at present furnishing coal to the amount of ten thousand tons (10,000) per month to the Southern Railway Company under a contract; the coal is delivered to the Southern Railway at Potomac Yard, near Washington, D. C., and Strasburg Junction, Virginia; the price is based upon a fuel coal rate to both Potomac Yard and Strasburg Junction of $1.34 per ton; that the commercial rate from the district where affiant's lines are situated to Potomac Yard is $1.90 per ton, and to Strasburg Junction is
68 $1.70 per ton; that the Southern Railway Company has advised affiant that in the event of the fuel rate being abolished it will use coal from its own line, as it can not afford to pay $1.90, the commercial rate; that the Southern Railway Company not only has coal upon its own line in Tennessee which it uses to some degree and would use more extensively and for a further distance north if the shipments to Potomac Yard and Strasburg Junction were stopped, but the said Southern Railway is also in a position to get coal from the line of the Chesapeake and Ohio Railway, the same being delivered to it at Lynchburg and Charlottesville on through rates for points beyond Lynchburg and Charlottesville, including Strasburg Junction and Potomac Yard; and as the transportation from either Lynchburg or Charlottesville to Strasburg Junction and Potomac Yard and points between would be over the Southern Railway Company's own line, the proportion of the rate covering that part of the transportation would be received by the Southern Railway Company itself, and the amount it would have to pay merely for the transportation to Lynchburg and Charlottesville would be much less than the amount paid for transportation of the Elkins Coal and Coke Company's coal either to Potomac Yard or Strasburg Junction under the commercial rate, thus showing the basis for the stand taken by said Southern Railway Company with this affiant that it would use coal from its own line in the event of the fuel rate being abolished.

S. B. ELKINS.

Sworn to and subscribed before me, the thirteenth day of May, 1911.

[SEAL.] LOUIS J. KOEPKE, *Notary Public.*

69 In the Commerce Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., petitioners, *vs.* UNITED STATES, RESPONDENT.	May session, 1911. No. 39.

STATE OF MARYLAND, *City of Baltimore, to wit:*

Personally appeared on this 13th day of May, 1911, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore aforesaid, John K. Shaw, president of the Century

Coal Company of West Virginia, and made oath in due form of law as follows:

That the Century Coal Company has a contract with the Southern Railway Company expiring on June 30, 1911, for the delivery to that company at Potomac Yard, near Washington, D. C., and at Strasburg, in the State of Virginia, of coal to the amount of 100,000 tons per year, and is shipping to the Southern Railway Company at the rate of about 120,000 a year: the said coal is sold to the said Southern Railway Company to be delivered at Potomac Yard and Strasburg, at a fixed price which includes the fuel rate of $1.34 per long ton alike to the said Potomac Yard and Strasburg. It is a part of the

70 agreement between the Century Coal Company and the Southern Railway Company that if the rate upon coal delivered from the Century Coal Company's mines at Potomac Yard and Strasburg shall change, the Southern Railway Company shall have the right to cancel said contract. The commercial rate on coal from the Century Coal Company's mine to Potomac Yard is $1.90 per ton, and to Strasburg $1.70 per ton. The Southern Railway Company has coal upon its own line in Tennessee; it can also receive coal off the Chesapeake and Ohio Railway both at Lynchburg and Charlottesville, in the State of Virginia. The Tennessee coal upon the Southern Railway Company's own line, can, of course, be used much further north than at present if that company cannot get coal at present rates at Potomac Yard and Strasburg. The coal off the Chesapeake and Ohio Railroad can be delivered to the Southern Railway at Lynchburg and Charlottesville on through rates for points on the Southern Railway's own line, including said Potomac Yard and Strasburg, and the proportion of said fuel rates to be paid by the Southern Railway will be much less than the commercial rate on the Century Coal Company's coal to Potomac Yard and Strasburg. This means that the Century Coal Company cannot hope to compete with the said coal coming off said Chesapeake and Ohio Railway. The officers of the Century Coal Company and those of the Southern Railway Company, have been in negotiation for some time for a renewal of said contract, but said negotiations have been broken off pending the decision of the said fuel rate question, as the cancelling of the said fuel rate is likely to make it to the interest of the Southern Railway Company to buy its coal elsewhere; indeed this affiant has been informed by officials of the Southern Railway Company that if the said fuel rate is cancelled the Southern Railway Company will purchase its coal elsewhere. Of course there is no competition between the coal carried to the Potomac Yard and Strasburg for said railway company's use, and the coal carried to those points for commercial use.

71 The coal business at this time is not active. The sale of said coal to the Southern Railway Company constitutes a very large portion of the business of said Century Coal Company and its loss would constitute a serious damage to it.

JOHN K. SHAW.

Subscribed and sworn to before me on the day and year first above written.

[SEAL.] W. J. McBRIDE, *Notary Public.*

72 In the Commerce Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., petitioners, *vs.* UNITED STATES, RESPONDENT. | May session, 1911. No. 39.

STATE OF OHIO, *County of Cuyahoga, to wit:*

Personally appeared before the subscriber on this 16th day of May, 1911, S. H. Robbins, the vice president of the Youghiogheny and Ohio Coal Company, and made oath in due form of law as follows:

That he is the vice president of the Youghiogheny and Ohio Coal Company, which ships coal from the Pittsburgh No. 8 district in Ohio; that said company has a contract for the delivery of one hundred and fifty thousand (150,000) tons of coal to the Grand Trunk Railway Company from the Pittsburg No. 8 district of Ohio at Toledo, for the use of said Grand Trunk Railway Company, between April 1, 1911, and April 1, 1912; that the said contract was taken on the basis of the fuel freight rate on said coal to Toledo of 72½ cents per ton, which is the rate which has been in force for a number of years, so that said coal company in making said contract had every reason to rely upon it as a safe basis for the making
73 a price on this coal; that if said coal is subjected to the commercial rates to Toledo it will be a great hardship upon it, so far as its present contract is concerned, and also so far as concerns any future sale of coal to the said Grand Trunk Railway Company, inasmuch as said Grand Trunk Railway Company can procure coal coming to its line from other points at a lower rate than said Youghiogheny and Ohio Coal Company can afford to furnish it if its coal is subjected to the commercial rate to Toledo.

S. H. ROBBINS,
Vice President, the Youghiogheny and Ohio Coal Co.

Sworn and subscribed to the day and date above written.

CUYAHOGA COUNTY, *State of Ohio, ss:*

[SEAL.] W. S. ROBISON, *Notary Public.*

74 And on the same day, to wit, the 19th day of May, 1911, being one of the days of the May session of said court, 1911, in the proceedings thereof in said entitled cause before the Honorable Martin A. Knapp, presiding judge, and the Honorables Robert W. Archbald, William H. Hunt, John E. Carland, and Julian W. Mack, judges, appears the following entry, to wit:

MOTION TAKEN UNDER ADVISEMENT.

Said cause came on for hearing before the court on the motion of the Interstate Commerce Commission to strike out certain portions of the petition; P. J. Farrell, Esquire, appearing in behalf of the Interstate Commerce Commission, and Hugh L. Bond, junior, Esquire, in behalf of the petitioners. Thereupon, said motion was taken under advisement by the court.

75 And on the 22d day of May, 1911, there was filed and entered in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

ORDER SUSTAINING MOTION TO STRIKE.

76 In the United States Commerce Court.

THE BALTIMORE AND OHIO R. R. CO. ET AL., PETITIONERS,
vs.
THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION, respondents. } No. 39.

This cause coming on to be heard on motion by the Inter-state Commission to strike out certain portions of the petition as immaterial and irrelevant, and having been argued by counsel, on due consideration thereof, it is ordered and adjudged that the motion be sustained and that the portions of the petition specified in the motion be stricken out.

BY THE COURT.

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP, *Presiding Judge.*

MAY 22, 1911.

77 And afterwards, to wit, on the 23d day of May, 1911, came the intervening respondent, Interstate Commerce Commission, by its solicitor, and filed in the clerk's office of said court its certain answer, in the words and figures following, to wit:

ANSWER OF INTERSTATE COMMERCE COMMISSION.

78 In the United States Commerce Court.

THE BALTIMORE & OHIO RAILROAD COMPANY et al., petitioners,
v.
UNITED STATES ET AL., RESPONDENTS. } In Equity. No. 39.

Answer of the Interstate Commerce Commission.

The Interstate Commerce Commission, one of the parties respondent in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage

of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answers and says:

I and II.

Answering paragraphs 1 and 2 of said petition:

This respondent admits that the allegations contained in said paragraphs are true.

III.

Answering paragraph 3 of the petition:

In each instance the allegations contained in said paragraph
79 relate to comparisons between coal on the one hand consigned to a railroad company and coal on the other hand consigned to some other party. The former is called railroad fuel coal and the latter is known as commercial coal. In each instance, however, regardless of the name of the consignee, the point of origin and point of destination of the shipment of coal transported by the petitioners where the traffic is railroad fuel coal is the same as where the traffic is commercial coal; but the rate or charge exacted in each instance by the petitioners for the transportation of railroad fuel coal over their respective lines of railway from certain points of origin to certain points of destination is much less than the rate or charge contemporaneously exacted by said petitioners for the transportation of commercial coal over the same line in the same direction and between the same points. Schedules or tariffs providing for such differences in rates and in the application of the rates have heretofore been established and put in force and are now maintained and enforced by petitioners.

Where, under the rate applied, the destination is a junction which is a point of connection between the lines of two or more of the petitioners, the movement of the coal, regardless of whether it is railroad fuel coal or commercial coal, is the same, except that at said destination the cars containing railroad fuel coal are ordinarily placed upon what is known as an exchange track, which is used in common by the connecting carriers, while the cars containing commer-
80 cial coal are usually placed upon a sidetrack of the delivering carrier. The cost of making delivery is practically the same whether the delivery relates to railroad fuel coal or to commercial coal, depending upon the nature of the delivery facilities furnished by the petitioners. Therefore, the cost in some instances of delivering the railroad fuel coal may be and is less than the cost of delivering the commercial coal, and it is also true that in some instances the cost of delivering the commercial coal may be and is less than the cost of delivering the railroad fuel coal. In this connection, how-

ever, respondent alleges that the differences as between railroad fuel coal on the one hand and commercial coal on the other hand are similar to the differences pertaining to some shipments of commercial coal as compared with other shipments of commercial coal.

Generally, what is known as "free time" is allowed by the petitioners; that is to say, a certain period of time for unloading the coal is allowed, and if the coal is unloaded within that time no charge for the use of the car in which the coal is shipped is made in addition to the charge included in the transportation rate; but if that time is exceeded a charge, in addition to said rate of $1 for each day or fraction of a day in excess of the free time, known as a demurrage charge, is exacted and collected by the petitioners, while the compensation paid by one carrier to another carrier for the use of the car owned by the latter is 25 cents per day; but where the coal transported is railroad fuel coal no free time is allowed, nor is such
81 demurrage charge exacted or collected. These differences, however, are offset, and much more than offset, by the differences in rates of transportation hereinbefore described.

Where the destination of the shipments of coal is not a point of connection between the lines of two or more of the petitioners the circumstances and conditions pertaining to the transportation and delivery of the coal are the same in substance as those above described, except that at such destination there are no exchange tracks used in common by two or more of the petitioners, and where the shipment passes over more than one line of railway to such destination delivery by one of the petitioners to another of the petitioners is made in the same way and under similar circumstances and conditions, regardless of whether such delivery pertains to railroad fuel coal or to commercial coal.

The lower rates established by the petitioners and applied by them to the transportation of railroad-fuel coal, as hereinabove described, are not open alike to all shippers, but are instead in and by the schedules and tariffs above mentioned and by reason of the practices of the petitioners confined to shippers of railroad-fuel coal and denied to shippers of all other coal, including commercial coal.

IV.

Answering paragraph 4 of the petition:

Respondent admits that each of the allegations contained in said paragraph is true.

82 ## V to XI.

Answering paragraphs 5 to 11, inclusive, of the petition:

Respondent denies the truth of the statement contained in paragraph 6 of the petition that "the commission erred in holding that

the rates fixed by the said tariffs for transportation to the junction point on shipments of coal going onto the line of the connecting carrier for further movement by it must under the provisions of section 2 of the act to regulate commerce be no more and no less than the rates charged on shipments of coal from the same point of origin for local delivery at said junction point." On the contrary, respondent alleges that, as shown on pages 24 and 25 of the petition, in respondent's report, which is included in Exhibit A to said petition, respondent said:

"We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination."

Respondent is informed and believes and thereupon alleges that in making the order, which is the subject matter of this suit and in the investigation upon which said order was and is based, respondent examined thoroughly and considered carefully every
83 fact, circumstance, and condition called to its attention by the petitioners and every other pertinent fact, circumstance, and condition, including degrees of difference and distinction, and each of and all the tariffs and rates of the petitioners which are affected by said order, and that in connection with such examination and consideration respondent did not entertain the opinion that, as stated in paragraph 10 of the petition, the facts, circumstances, and conditions surrounding, attaching to, and affecting the traffic in railroad fuel coal, and not attaching to and affecting traffic in other coal, could not lawfully be considered by respondent as distinguishing the traffic in railroad fuel coal from the traffic in other coal.

Respondent denies the truth of each of and all allegations contained in said petition, except to the extent that the truth of said allegations is admitted in the answers thereto hereinabove made by respondent.

Respondent alleges that all the traffic hereinbefore described, and all the traffic to which said order relates, is traffic transported by the petitioners from one State or Territory of the United States or the District of Columbia to another State or Territory of the United States or the District of Columbia, and is therefore interstate.

By reason of the premises, respondent alleges that said railroad fuel coal as compared with said other coal, including commercial coal, is a like kind of traffic; and that the aforesaid services performed by the petitioners in and in connection with the trans-
84 portation of said railroad fuel coal, as compared with the services performed by the petitioners in and in connection with the transportation of said other coal, including commercial coal, are like and contemporaneous and are performed by petitioners under substantially similar circumstances and conditions.

By reason of the matters above set forth, and the practices hereinbefore described, respondent alleges that the petitioners have been and are charging, demanding, collecting, and receiving from certain persons a compensation greater than the compensation they have been and are charging, demanding, collecting, and receiving from other persons for like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions, in violation of section 2 of the act to regulate commerce, and have been and are giving undue and unreasonable preference and advantage to railroad fuel coal and the traffic therein, and to the shippers and owners thereof, and have been and are subjecting to undue and unreasonable prejudice and disadvantage other coal, including commercial coal, and the traffic therein, and the shippers and owners thereof, in violation of section 3 of said act.

Respondent further alleges that all the allegations contained in said petition relate to matters within the jurisdiction of this respondent under said act and are covered by the aforesaid report and order of respondent; that the findings of fact made by respondent and contained in said report and order relate only to matters
85 within said jurisdiction, and that therefore the correctness of said findings of fact is a matter which is not open to review in this or any other court.

All of which matters and things the respondent is ready to aver, maintain, and prove as this honorable court shall direct, and thereby prays to be hence dismissed, with its reasonable costs and charges in that behalf sustained.

THE INTERSTATE COMMERCE COMMISSION,
By P. J. FARRELL, *Its Solicitor.*

WASHINGTON, *District of Columbia, ss:*

This day personally appeared before me, the undersigned, Edgar E. Clark, who, being by me first duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, one of the parties respondent named in the foregoing answers; that he knows the contents thereof, and that the facts and allegations in said answer contained are true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

EDGAR E. CLARK.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this the 23rd day of May, 1911.

[L. S.] H. S. MILSTEAD, *Notary Public.*

86 And on the 24th day of May, 1911, being one of the days of the May session of said court, 1911, in the proceedings thereof in said entitled cause before the Honorable Martin A. Knapp, presiding judge, and the Honorables Robert W. Archbald, William H. Hunt,

John E. Carland, and Julian W. Mack, judges, appears the following entry, to wit:

CAUSE TAKEN UNDER ADVISEMENT.

Said cause came on to be heard before the court on the petition and answer; Hugh L. Bond, junior, Esquire, and W. I. Cross, Esquire, appearing on behalf of the petitioners, Blackburn Esterline, Esquire, appearing on behalf of the United States, and P. J. Farrell, Esquire, on behalf of the Interstate Commerce Commission. The arguments of counsel were concluded and the cause was taken under advisement by the court.

87 And afterwards, to wit, on the 29th day of May, 1911, there was filed and entered in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

ORDER GRANTING PETITION FOR PRELIMINARY INJUNCTION.

88 In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL., petitioners. *vs.* UNITED STATES, RESPONDENT.	No. 39. May term, 1911.

This cause coming on to be heard on motion for a preliminary injunction suspending the order of the Interstate Commerce Commission, wherein said petitioners were required on or before the fifteenth day of May—extended to the fifteenth day of June—A. D. 1911, to cease and desist and for a period of two years thereafter to abstain from their present practice of maintaining and using tariffs on coal, the rates in which are restricted to shipments of or for certain consignors or consignees, or when the coal transported is for a particular use.

And wherein they were further required on or before the date aforesaid to cease and desist, and for a period of two years thereafter to abstain from maintaining any rates on coal which are applicable only to the shipments of certain consignors or consignees, or when the coal transported is put to a designated use, and which rates are not open alike for all shippers.

And the said motion having been argued by counsel, Hugh L. Bond, jr., and W. Irvine Cross, for the petitioners; and Blackburn Esterline, for the United States; and P. J. Farrell, for the Interstate Commerce Commission, upon due consideration thereof and of the bill and affidavits of the petitioners and the answer of the Interstate Commerce Commission, intervening in that behalf, it is thereupon ordered and adjudged that the order of the said the Interstate Com-

merce Commission aforesaid be suspended and enjoined until the further order of the court.

By the Court.

[Seal of the
United States Commerce Court.]

Martin A. Knapp, *Presiding Judge.*

May 29, 1911.

89 And afterwards, to wit, on the 31st day of May, 1911, a certain injunction issued out of the clerk's office of said court addressed to the Honorable George W. Wickersham as Attorney General of the United States, and to the Honorable Judson C. Clements as chairman of the Interstate Commerce Commission, which said injunction, together with the marshal's returns endorsed thereon, is in the words and figures following, to wit:

PRELIMINARY INJUNCTION.

90 In the United States Commerce Court.

The Baltimore and Ohio Railroad Company; The Pennsylvania Railroad Company, The Pennsylvania Company; Buffalo, Rochester and Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; The Wheeling and Lake Erie Railroad Company and B. A. Worthington, receiver thereof; The Lake Shore and Michigan Southern Railway Company; The Pittsburgh and Lake Erie Railroad Company; Buffalo and Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo and Susquehanna Railway Company; The Western Maryland Railway Company; The Pittsburg, Shawmut and Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners, *vs.* United States, respondent.	No. 39.

Whereas, on the nineteenth day of May, 1911, the above-entitled cause came on to be heard on motion for a preliminary injunction suspending the order of the Interstate Commerce Commission dated February 24th, 1911, wherein the above-named petitioners were required on or before the fifteenth day of May—extended to the fifteenth day of June—A. D. 1911, to cease and desist and for a period of two years thereafter to abstain from their present practice of maintaining and using tariffs on coal the rates in which are restricted to shipments of or for certain consignors or consignees, or when the coal transported is for a particular use; and wherein they were further required on or before the date aforesaid to cease and desist, and for a period of two years thereafter to abstain, from

maintaining any rates on coal which are applicable only to the shipments of certain consignors or consignees, or when the coal transported is put to a designated use, and which rates are not open alike for all shippers:

And whereas, the said motion having been argued by counsel, upon due consideration thereof and of the bill and affidavits of the petitioners and the answer of the Interstate Commerce Commission, intervening in that behalf, it has been ordered and adjudged
91 that the order of the said Interstate Commerce Commission aforesaid be suspended and enjoined until the further order of the court;

Now, therefore, you, the Honorable George W. Wickersham, as Attorney General of the United States, and the Honorable Judson C. Clements, as chairman of the Interstate Commerce Commission, are strictly enjoined and restrained from taking, instituting, or prosecuting, or attempting to take, institute, or prosecute any action or proceeding whatsoever, to enforce the order dated February 24th, 1911, of the Interstate Commerce Commission made and filed after a certain inquiry instituted by the said commission under an order of January 4th, 1910, entitled "In the matter of restricted rates," until the further order of this court in the premises, under the pains and penalties that may fall thereon. Hereof fail not at your peril.

Witness the Honorable Martin A. Knapp, presiding judge of our said United States Commerce Court, the 29th day of May, 1911.

Issued the 31st day of May, 1911.

[Seal of the
United States Commerce Court.]

G. F. SNYDER,
Clerk of our said United States Commerce Court.

Served the foregoing injunction on the Attorney General of the United States and a duplicate of same left with him this 31st day of May, 1911.

F. J. STAREK, *Marshal.*

Accepted by Blackburn Esterline.

Served the foregoing injunction on the chairman of the Interstate Commerce Commission and a duplicate of same left with him this 31st day of May, 1911.

F. J. STAREK, *Marshal.*

Accepted by Judson C. Clements.

92 And afterwards, to wit, on the 6th day of June, 1911, came the intervening respondent, the Interstate Commerce Commission, by its solicitor, and filed in the clerk's office of said court, in said entitled cause, its certain petition for appeal, in the words and figures following, to wit:

PETITION FOR APPEAL BY INTERSTATE COMMERCE COMMISSION.

93 In the United States Commerce Court.

In Equity. No. 39.

THE BALTIMORE & OHIO RAILROAD COMPANY; The Pennsylvania Railroad Company; The Pennsylvania Company; Buffalo, Rochester & Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; The Wheeling & Lake Erie Railroad Company and B. A. Worthington, receiver thereof; The Lake Shore & Michigan Southern Railway Company; The Pittsburgh & Lake Erie Railroad Company; Buffalo & Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo & Susquehanna Railway Company; The Western Maryland Railway Company; The Pittsburg, Shawmut & Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners,

v.

UNITED STATES, RESPONDENT, AND INTERSTATE Commerre Commission, intervening respondent.

May session, 1911.

Petition for appeal.

The Interstate Commerce Commission, the intervening respondent in the above-entitled cause, by its solicitor, represents that in the decree or order of said Commerce Court in said cause, rendered on the 29th day of May, 1911, there was manifest error to its injury, and therefore prays for an order granting an appeal from said decree to the Supreme Court of the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

94 And on the same day, to wit, the 6th day of June, 1911, came the intervening respondent, the Interstate Commerce Commission, by its solicitor, and filed in the clerk's office of said court, in said entitled cause, its certain assignment of errors in the words and figures following, to wit:

ASSIGNMENT OF ERRORS BY INTERSTATE COMMERCE COMMISSION.

95 In the United States Commerce Court.

In Equity No. 39.

The Baltimore & Ohio Railroad Company; The Pennsylvania Railroad Company; The Pennsylvania Company; Buffalo, Rochester & Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; The Wheeling & Lake Erie Railroad Company and B. A. Worthington, receiver thereof; The Lake Shore & Michigan Southern Railway Company; The Pittsburgh & Lake Erie Railroad Company; Buffalo & Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo & Susquehanna Railway Company; The Western Maryland Railway Company; The Pittsburg, Shawmut & Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners.	May session, 1911.
v.	
United States, respondent, and Interstate Commerce Commission, intervening respondent.	

Assignment of errors.

And now, on the 6th day of June, 1911, comes the above-named intervening respondent, Interstate Commerce Commission, by its solicitor, and says that the decree in the above-entitled cause is erroneous and against the just rights of said respondent for the following reasons:

First. The court erred in not dismissing the petition for want of equity.

Second. The court erred in granting the temporary injunction enjoining enforcement of the order of the commission for
96 the following reasons:

(a) That said petitioners have not, nor has any of them, in and by their said petition shown that the legislative department of the Government of the United States is or ever has been without power to grant the authority exercised by the commission in making said order.

(b) That said petitioners have not, nor has any of them, in and by said petition shown that said legislative department did not duly confer upon this commission the authority exercised by this commission in making said order.

(c) That said petitioners have not, nor has any of them, in and by said petition shown that the subject matter of said order is not within the jurisdiction conferred upon the commission by said legislative department.

(d) That said petitioners have not, nor has any of them, in and by said petition shown that in making said order the commission exercised authority in excess of the authority conferred upon it by said legislative department.

(e) That said petitioners have not, nor has any of them, in and by said petition shown that in making said order the commission exercised either unreasonably or unlawfully the authority, or any of the authority, conferred upon it by said legislative department.

(f) That said petitioners have not, nor has any of them, in and by said petition shown that in making said order the commission violated any constitutional or other right of said petitioners, or of any of said petitioners, over which the Commerce Court exercised or may exercise jurisdiction.

Third. The court erred in holding that the practice of the petitioners whereby they transport railroad fuel coal, in carloads, over their lines of railway between certain points, for compensation
97 which is less in each instance than the compensation they contemporaneously exact for the transportation, in carloads, of other coal, including commercial coal, over the same lines of railway, in the same direction and between the same points, is not a violation of section 2 of the act to regulate commerce.

Fourth. The court erred in holding that the tariffs published and filed by the petitioners, wherein and whereby it is provided that the rates to be charged in each instance for the transportation of railroad fuel coal, in carloads, over the petitioners' lines of railway between certain points, shall be less than the rates contemporaneously exacted by petitioners for the transportation, in carloads, of other coal, including commercial coal, over the same lines of railway, in the same direction and between the same points, do not provide for the discrimination prohibited by said section 2.

Fifth. The court erred in holding that the practice and discrimination aforesaid do not constitute the undue preference and undue prejudice prohibited by section 3 of said act.

Sixth. The court erred in holding that where discrimination is made as aforesaid by the petitioners, it may be justified by showing that said railroad fuel coal is shipped by one party, and that said other coal is shipped by another and different party.

Seventh. The court erred in holding that where discrimination is made as aforesaid by the petitioners, it may be justified by showing that the consignee of said railroad fuel coal is one party, and that the consignee of said other coal is another and different party.

Eighth. The court erred in holding that where discrimination is made as aforesaid by the petitioners, it may be justified by showing that said railroad fuel coal is to be used for one purpose, and that said other coal is to be used for another and different purpose.

98 Ninth. The court erred in holding that it is proper to consider how and by whom the coal transported is handled previous to the time when it is offered to the petitioners for transportation at point of origin, in determining whether or not said railroad fuel

coal is transported by petitioners under circumstances and conditions which are substantially similar to the circumstances and conditions pertaining to the transportation by the petitioners of said other coal.

Tenth. The court erred in holding that it is proper to consider how and by whom the coal transported is handled subsequent to the time when it is delivered by the petitioners to the consignee at point of destination, in determining whether or not said railroad fuel coal is transported by petitioners under circumstances and conditions which are substantially similar to the circumstances and conditions pertaining to the transportation of said other coal.

Eleventh. The court erred in holding that the practice and discrimination aforesaid may be justified by showing differences in circumstances and conditions, arising after the coal is tendered by the consignor to petitioners for transportation at point of origin and before it is delivered by petitioners to the consignee at point of destination, which are wholly artificial and entirely created by the petitioners.

Twelfth. The court erred in substituting its own judgment for the judgment of the commission concerning the question of whether or not said railroad fuel coal, as compared with said other coal, is a like kind of traffic.

Thirteenth. The court erred in substituting its own judgment for the judgment of the commission concerning the question of whether or not the transportation services performed by the petitioners
99 as aforesaid, in and in connection with the transportation of said railroad fuel coal, as compared with the services performed by the petitioners as aforesaid, in and in connection with the transportation of said other coal, are like and contemporaneous.

Fourteenth. The court erred in substituting its own judgment for the judgment of the commission, concerning the question of whether or not the services performed by the petitioners, as aforesaid, in and in connection with the transportation of said railroad fuel coal as aforesaid, as compared with the services performed by the petitioners as aforesaid, in and in connection with the transportation of said other coal, are performed by petitioners under substantially similar circumstances and conditions.

Fifteenth. The court erred in substituting its own judgment for the judgment of the commission, concerning the character of the discrimination and preference and prejudice aforesaid.

Sixteenth. The court erred in making the order granting the temporary injunction for the following reasons:

(a) The court did not, in accordance with section 3 of the Commerce Court act of June 18, 1910, state that irreparable damage to said petitioners or to one or more of them would result if the order were not made and such injunction granted.

(b) The court did not, in accordance with said section 3, include in said order a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result if the order were not made and such injunction granted.

(c) The court did not, in accordance with said section 3, specify in said order the nature of such damage.

Wherefore this respondent prays that said decree be reversed.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

100 And on the same day, to wit, the 6th day of June, 1911, there was filed in the clerk's office of said court, in said entitled cause, a certain order in the words and figures following, to wit:

ORDER ALLOWING APPEAL OF INTERSTATE COMMERCE COMMISSION.

101 In the United States Commerce Court.

In equity, No. 39.

THE BALTIMORE & OHIO RAILROAD COMPANY; THE Pennsylvania Railroad Company; The Pennsylvania Company; Buffalo, Rochester & Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; The Wheeling & Lake Erie Railroad Company and B. A. Worthington, receiver thereof; The Lake Shore & Michigan Southern Railway Company; The Pittsburgh & Lake Erie Railroad Company; Buffalo & Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo & Susquehanna Railway Company; The Western Maryland Railway Company; The Pittsburg, Shawmut & Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners.	May session, 1911.
v.	
UNITED STATES, RESPONDENT, AND INTERSTATE Commerce Commission, intervening respondent.	

Order allowing appeal.

In this cause, the Interstate Commerce Commission, the intervening respondent, by its solicitor, P. J. Farrell, having made its application in writing for an appeal from the decree therein, rendered on the 29th day of May, 1911, to the Supreme Court of the United States, it is therefore ordered that said appeal be, and the same is hereby, granted and made returnable on the sixth day of July, 1911.

[Seal of the
United States Commerce Court.]

(Signed) MARTIN A. KNAPP,
Presiding Judge.

102 And afterwards, to wit, on the 16th day of June, 1911, came the respondent, the United States, by its Attorney General, and filed in the clerk's office of said court, in said entitled cause, its certain petition for appeal, in the words and figures following, to wit:

PETITION FOR APPEAL BY UNITED STATES.

103 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY; The Pennsylvania Railroad Company; The Pennsylvania Company; Buffalo, Rochester and Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; The Wheeling and Lake Erie Railroad Company, and B. A. Worthington, Receiver Thereof; The Lake Shore and Michigan Southern Railway Company; The Pittsburgh and Lake Erie Railroad Company; Buffalo and Susquehanna Railway Company; Harry I. Miller, Receiver, Buffalo and Susquehanna Railway Company; Erie Railroad Company; The Western Maryland Railway Company; The Pittsburg, Shawmut and Northern Railroad Company and Frank Sullivan Smith, Receiver Thereof, petitioners,

v.

UNITED STATES, RESPONDENT.

May session, 1911. No. 39.

Petition for Appeal by the United States.

The United States of America, feeling itself aggrieved by the interlocutory order or decree of the Commerce Court, entered May 29, 1911, suspending and enjoining the order of the Interstate Commerce Commission and in issuing a preliminary injunction enjoining and restraining the enforcement thereof, by George W. Wickersham, its Attorney General, prays an appeal to the Supreme Court of the United States, in accordance with section 2 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

The particulars wherein the United States considers said order or decree erroneous are set forth in the assignment of errors herewith filed, to which reference is made.

And the United States further prays that a transcript of the record, proceedings, and papers on which the order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

Washington, June 16, 1911.

(Signed) GEORGE W. WICKERSHAM,
Attorney General of the United States.

Allowed:

[Seal of the
United States Commerce Court.]

MARTIN A. KNAPP,
United States Circuit Judge and Presiding Judge of the United States Commerce Court in Said Cause.

104 And on the same day, to wit, the 16th day of June, 1911, came the respondent, the United States, by its Attorney General, and filed in the clerk's office of said court, in said entitled cause, its certain assignment of errors, in the words and figures following, to wit:

ASSIGNMENT OF ERRORS BY UNITED STATES.

105 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., petitioners, *v.* UNITED STATES, RESPONDENT. | May session, 1911. No. 39.

Assignment of errors by the United States.

Comes now the United States of America, by George W. Wickersham, its Attorney General, and in connection with its application for appeal files the following assignment of errors, on which it will rely upon said appeal to the Supreme Court of the United States, from the interlocutory order or decree of the Commerce Court, entered May 29, 1911, in the above entitled cause.

The Commerce Court erred:

I.

In suspending and enjoining the order of the Interstate Commerce Commission and in issuing a preliminary injunction enjoining and restraining the enforcement thereof, (a) for that the said petition does not set forth any cause of action and is insufficient to justify the order or decree suspending and enjoining the order of the Interstate Commerce Commission and the issuance of the preliminary injunction, or to form the basis for any relief; (b) for that in the said petition there is no equity upon which to base the order or decree suspending and enjoining the order of the Interstate Commerce Commission and the issuance of the preliminary injunction, or to form the basis for any relief; (c) for that the said petition does

106 not show that in making its said order the Interstate Commerce Commission acted beyond its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) for that the said petition does not show that in

making its said order the Interstate Commerce Commission violated any right of the said petitioners protected by the Constitution of the United States, or any other right of the said petitioners over which this court may exercise jurisdiction.

II.

In issuing a preliminary injunction against the Attorney General of the United States and serving the same upon him, strictly enjoining and restraining him from taking, instituting, or prosecuting, or attempting to take, institute, or prosecute any action or proceeding whatsoever, to enforce the said order of the Interstate Commerce Commission until the further order of the court.

III.

In not making a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the petitioners, and so stating in said interlocutory order or decree, and further specifying the nature of the damage, in accordance with section 3 of an act entitled "An act to create a Commerce Court," etc., approved, June 18, 1910.

IV.

In suspending and enjoining the order of the Interstate Commerce Commission and in issuing a preliminary injunction, for that in receiving coal for transportation the petitioners, as common carriers, may not make the ownership of the coal, or the manner in which it is handled previous to the time it is received for transportation, or
the nature of the consignor or the nature of the consignee, or
107 the manner in which it is handled subsequent to the time it is
delivered, or the use which may be made of the same, the criterion by which their rates and charges are to be measured for the transportation services rendered by them in the transportation of such coal, and restrict their said rates and charges to such shipments; and that to deny the said rates and charges to other consignors and consignees of coal, when used by them for commercial purposes or for other purposes, when their said coal is transported over the same line of railroad in the same direction and between the same points, is in violation of sections 2 and 3 of the act to regulate commerce.

V.

In suspending and enjoining the order of the Interstate Commerce Commission and in issuing a preliminary injunction, for that the purchase by the petitioners, from the owner of the mine, of coal for use in firing the locomotives of the said petitioners, commonly known as fuel coal, and the sale of such coal by the owner of such mine to

the said petitioners, for such use, is a private contract or transaction of purchase and sale between the said petitioners and the owner of the mine, and the said coal is the private property of the owner of such mine until the title thereto, under the contract of purchase and sale, passes to the said petitioners, when the said coal becomes the private property of the said petitioners; and that the practice of petitioners of charging, collecting, and receiving from the owners thereof a less or different rate or charge for the transportation of such fuel coal than is charged, collected, and received for the transportation of coal which is the property of other consignors and consignees, and used for commercial purposes, or for other purposes, when the latter coal is transported over the same line of railroad, in the same direction and between the same points, is in viola-
108 tion of sections 2 and 3 of the act to regulate commerce.

VI.

In suspending and enjoining the order of the Interstate Commerce Commission and in issuing a preliminary injunction, for that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its decision, order or requirement in the premises, said Interstate Commerce Commission found that the tariffs which contain rates applicable only to the shipments of certain consignees or when a commodity is put to a particular use, and the rates which are so restricted to the use of certain shippers and not open to all shippers alike, are in violation of section 2 of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine, and its report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to form the basis for the temporary injunction or for any relief.

VII.

In suspending and enjoining the order of the Interstate Commerce Commission and in issuing a preliminary injunction, for that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its decision, order or requirement in the premises, said Interstate Commerce Commission found that the tariffs which contain rates applicable only to the shipments of certain consignees or when a commodity is put to a particular use, and the rates which are so restricted to the use of certain shippers and not open to all shippers alike, are unjustly discriminatory in
109 violation of section 3 of the act to regulate commerce; all of which were matters and things within the power of that body to hear and determine, and its report and order in the premises are conclusive upon the court and the matters and things alleged in the

petition are insufficient to form the basis for the temporary injunction or for any relief.

VIII.

In suspending and enjoining the order of the Interstate Commerce Commission and in issuing a preliminary injunction, for that the said order is not open to attack in the courts because the Interstate Commerce Commission in making and entering the said order kept within the powers conferred upon it by the statute.

IX.

In not dismissing, for the foregoing reasons, on its own motion, the said petition.

Wherefore the United States prays that the said interlocutory order or decree of the Commerce Court entered May 29, 1911, be reversed, annulled and set aside, and that the said petition be dismissed; and for such other and further order as may be appropriate.

Washington, June 16, 1911.

GEORGE W. WICKERSHAM,
Attorney General of the United States.

110 And on the same day, to wit, the 16th day of June, 1911, there was filed and entered in the clerk's office of said court, in said entitled cause, a certain order, in the words and figures following, to wit:

ORDER ALLOWING APPEAL OF THE UNITED STATES.

111 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., petitioners, v. UNITED STATES, RESPONDENT.	May session, 1911. No. 39.

Order allowing appeal of the United States.

Be it remembered, that in the above entitled cause, on this 16th day of June, 1911, the United States of America by George W. Wickersham, its Attorney General, having made and filed its petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered May 29, 1911, and having at the same time made and filed its assignment of errors; and having in all respects conformed to the statute and the rules of court in such case made and provided—

It is ordered and decreed that the said appeal be and the same is hereby allowed as prayed; and the clerk is directed to transmit forth-

with a properly authenticated transcript of the record, papers and proceedings to the Supreme Court of the United States.

Washington, June 16, 1911.

[Seal of the
United States Commerce Court.]

MARTIN A. KNAPP,
United States Circuit Judge, and Presiding Judge of the United States Commerce Court in said cause.

112 PRÆCIPE FOR TRANSCRIPT OF RECORD.

In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.,
v.
UNITED STATES. } No. 39.

To the clerk of said court:

You will please prepare a transcript of the record in the above entitled cause, to be filed in the office of the clerk of the Supreme Court of the United States, upon the appeals of the United States and the Interstate Commerce Commission, intervening respondent, and include in said transcript the following pleadings, proceedings, and papers on file or of record, to wit:

Petition for injunction, with exhibits, filed April 27, 1911 (excluding Exhibit B).

Notice issued and filed in the Department of Justice, April 28, 1911.

Notice issued and filed in the office of the Secretary of the Interstate Commerce Commission, April 28, 1911.

Appearance of P. J. Farrell, Esq., for Interstate Commerce Commission, filed May 8, 1911.

Notice and motion to strike by Interstate Commerce Commission, filed May 15, 1911.

Petitioners' notice of motion and affidavits, filed May 19, 1911.

Order sustaining motion of Interstate Commerce Commission to strike, entered May 22, 1911.

Answer of Interstate Commerce Commission, filed May 23, 1911.

Order granting application for preliminary injunction, entered May 29, 1911.

Temporary injunction issued in accordance with order of May 29, with service on the Attorney General and the chairman of the Interstate Commerce Commission.

113 Petition for appeal, assignment of errors, and order allowing appeal, of the Interstate Commerce Commission, June 6, 1911.

Citation on appeal of Interstate Commerce Commission, issued June 6, 1911, with return of service.

Citation on appeal of Interstate Commerce Commission to Erie Railroad Company, with return of service.

Petition for appeal, assignment of errors, and order allowing appeal, of the United States, June 16, 1911.

Citation on appeal of the United States, issued June 16, 1911, with return of service.

(Signed) BLACKBURN ESTERLINE,
For the United States.

(Signed) P. J. FARRELL,
Solicitor for the Interstate Commerce Commission.

JUNE 26, 1911.

114 In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY; THE Pennsylvania Railroad Company; The Pennsylvania Company; Buffalo, Rochester and Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; The Wheeling and Lake Erie Railroad Company, and B. A. Worthington, receiver thereof; The Lake Shore and Michigan Southern Railway Company; the Pittsburgh and Lake Erie Railroad Company; Buffalo and Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo and Susquehanna Railway Company; Erie Railroad Company; The Western Maryland Railway Company; The Pittsburg, Shawmut and Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners,

vs.

UNITED STATES, RESPONDENT, AND INTERSTATE COMMERCE Commission, intervening respondent.

No. 39.

DISTRICT OF COLUMBIA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 113, inclusive) to be a true and complete transcript of the proceedings had of record in the above-entitled cause, made in accordance with the præcipe filed in the clerk's office of said court on the 26th day of June, A. D. 1911, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 5th day of July, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

115 In the United States Commerce Court.

In Equity. No. 39.

Filed June 6, 1911. United States Commerce Court, G. F. Snyder, clerk.

THE BALTIMORE & OHIO RAILROAD COMPANY; The Pennsylvania Railroad Company; The Pennsylvania Company; Buffalo, Rochester & Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; The Wheeling & Lake Erie Railroad Company and B. A. Worthington, receiver thereof; The Lake Shore & Michigan Southern Railway Company; The Pittsburgh & Lake Erie Railroad Company; Buffalo & Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo & Susquehanna Railway Company; The Western Maryland Railway Company; The Pittsburg, Shawmut & Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners,

v.

UNITED STATES, RESPONDENT, AND INTERSTATE Commerce Commission, intervening respondent.

May session, 1911.

Citation on appeal.

THE UNITED STATES OF AMERICA:

The President of the United States to the Baltimore & Ohio Railroad Company; The Pennsylvania Railroad Company; The Pennsylvania Company; The Buffalo, Rochester & Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; The Wheeling & Lake Erie Railroad Company and B. A. Worthington, receiver therefor; The Lake Shore & Michigan Southern Railway Company; The Pittsburgh & Lake Erie Railroad Company; The Buffalo & Susquehanna Railway Company;
116 Harry I. Miller, receiver, Buffalo & Susquehanna Railway Company; The Western Maryland Railway Company; The Pittsburg, Shawmut & Northern Railroad Company and Frank Sullivan Smith, receiver thereof, or Hugh L. Bond, jr., George F. Brownell, George Stuart Patterson, Clyde Brown, and William M. Duncan, their solicitors of record, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to the appeal sued out

and filed in the clerk's office in the United States Commerce Court, in the cause wherein the United States is respondent and the Interstate Commerce Commission is an intervening respondent, and said the Baltimore & Ohio Railroad Compay; the Pennsylvania Railroad Company; the Pennsylvania Company; the Buffalo, Rochester & Pittsburgh Railway Company; the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; the Wheeling & Lake Erie Railroad Company and B. A. Worthington, receiver thereof; the Lake Shore & Michigan Southern Railway Company; the Pittsburgh & Lake Erie Railroad Company; the Buffalo & Susquehanna Railway Company; Harry I. Miller, receiver, the Buffalo & Susquehanna Railway Company; the Western Maryland Railway Company; the Pittsburg, Shawmut & Northern Railroad Company and Frank Sullivan Smith, receiver thereof, are petitioners, to show cause, if any there be, why the decree rendered against the United States and the Interstate Commerce Commission, aforesaid, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

117 Witness, the Honorable Martin A. Knapp, United States Commerce Court judge, this the sixth day of June, in the year of our Lord, one thousand nine hundred and eleven.

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP,
Presiding Judge.

118 Certified copy of foregoing citation on appeal served upon Geo. E. Hamilton, the designated agent of the Baltimore & Ohio Railroad Company, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by Louise F. Dyer for George E. Hamilton.

Certified copy of foregoing citation on appeal served upon F. D. McKenney, the designated agent of the Pennsylvania Railroad Company, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by F. D. McKenney.

Certified copy of foregoing citation on appeal served upon F. D. McKenney, the designated agent of the Pennsylvania Company, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by F. D. McKenney.

Certified copy of foregoing citation on appeal served upon Thompson & Slater, the designated agent of the Buffalo, Rochester & Pittsburgh Railway Company, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by M. Woodville for Thompson & Slater.

119 Certified copy of foregoing citation on appeal served upon F. D. McKenney, the designated agent of the Pittsburgh, Cin-

cinnati, Chicago & St. Louis Railway Company, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by F. D. McKenney.

Certified copy of foregoing citation on appeal served upon C. N. Osgood, the designated agent of the Wheeling & Lake Erie Railroad Company and B. A. Worthington, receiver thereof, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by J. H. Hinwood for C. N. Osgood.

Certified copy of foregoing citation on appeal served upon C. N. Osgood, the designated agent of the Lake Shore & Michigan Southern Railway Company, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by J. H. Hinwood for C. N. Osgood.

Certified copy of foregoing citation on appeal served upon C. N. Osgood, the designated agent of the Pittsburgh & Lake Erie Railroad Company, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by J. H. Hinwood for C. N. Osgood.

120 Certified copy of foregoing citation on appeal served upon C. N. Osgood, the designated agent of the Buffalo & Susquehanna Railway Company, and Harry I. Miller, receiver, Buffalo & Susquehanna Railway Company, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by J. H. Hinwood for C. N. Osgood.

Certified copy of foregoing citation on appeal served upon C. N. Osgood, the designated agent of the Western Maryland Railway Company, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by Geo. H. Poske for S. C. Wood.

Certified copy of foregoing citation on appeal served upon John N. Drake, the designated agent of the Pittsburg, Shawmut & Northern Railroad Company and Frank Sullivan Smith, receiver thereof, at Washington, this 8th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by B. S. Knapp, atty. for John N. Drake, agent.

121 In the United States Commerce Court.

In Equity. No. 39.

Filed. United States Commerce Court. June 20, 1911. G. F. Snyder, clerk.

THE BALTIMORE & OHIO RAILROAD COMPANY; Erie Railroad Company et al., petitioners, *v.* UNITED STATES, RESPONDENT; AND INTERSTATE Commerce Commission, intervening respondent. } May session, 1911.

Citation on appeal.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Erie Railroad Company, or to George F. Brownell, its solicitor of record, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to the appeal sued out and filed in the clerk's office in the United States Commerce Court, in the cause wherein the United States is respondent and the Interstate Commerce Commission is an intervening respondent, and said the Baltimore & Ohio Railroad Company; the Pennsylvania Railroad Company; the Pennsylvania Company; the Buffalo, Rochester & Pittsburgh Railway Company; the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; the Wheeling & Lake Erie

122 Railroad Company and B. A. Worthington, receiver thereof; the Lake Shore & Michigan Southern Railway Company; the Pittsburgh & Lake Erie Railroad Company; the Buffalo & Susquehanna Railway Company; Harry I. Miller, receiver, the Buffalo & Susquehanna Railway Company; the Erie Railroad Company; the Western Maryland Railway Company; the Pittsburg, Shawmut & Northern Railroad Company and Frank Sullivan Smith, receiver thereof, are petitioners, to show cause, if any there be, why the decree rendered against the United States and the Interstate Commerce Commission, aforesaid, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness, the Honorable Martin A. Knapp, United States circuit judge and presiding judge of the Commerce Court, this, the 20th day of June, in the year of our Lord, one thousand nine hundred and eleven.

[Seal of the United States Commerce Court.]

MARTIN A. KNAPP,
Presiding Judge.

Certified copy of the foregoing citation on appeal served upon S. C. Wood, the designated agent of the Erie Railroad Company, at

Washington, this 20th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by George H. Poske for S. C. Wood.

123 UNITED STATES OF AMERICA, *ss:*

To the Baltimore and Ohio Railroad Company; the Pennsylvania Railroad Company; the Pennsylvania Company; Buffalo, Rochester and Pittsburgh Railway Company; the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; the Wheeling and Lake Erie Railroad Company and B. A. Worthington, receiver thereof; the Lake Shore and Michigan Southern Railway Company; the Pittsburgh and Lake Erie Railroad Company; Buffalo and Susquehanna Railway Company; Harry I. Miller, receiver Buffalo and Susquehanna Railway Company; Erie Railroad Company; the Western Maryland Railway Company; the Pittsburg, Shawmut and Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal allowed and filed in the clerk's office of the United States Commerce Court, Washington, D. C., wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the order or decree of the United States Commerce Court against the said United States as in the said petition of appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Martin A. Knapp, United States circuit judge and presiding judge of the United States Commerce Court in said cause, this 16th day of June, A. D. 1911.

[Seal of the
United States Commerce Court.]

MARTIN A. KNAPP,
United States Circuit Judge and Presiding Judge of the United States Commerce Court in said cause.

Attest:
G. F. SNYDER,
Clerk of the United States Commerce Court.

124 Certified copy of the foregoing citation on appeal served upon Geo. E. Hamilton, 916 Union Trust Bldg., the designated agent of the Baltimore & Ohio Railroad Company, at Washington, this 19th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by Louise J. Dyer for G. E. Hamilton.

Certified copy of the foregoing citation on appeal served upon F. D. McKenney, Hibbs Bldg., the designated agent of the Pennsylvania Railroad Company, at Washington, this 17th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by F. D. McKenney.

Certified copy of the foregoing citation on appeal served upon F. D. McKenney, Hibbs Bldg., the designated agent of the Pennsylvania Company, at Washington, this 17th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by F. D. McKenney.

Certified copy of the foregoing citation on appeal served upon Thompson & Slater, Munsey Bldg., the designated agent of the Buffalo, Rochester and Pittsburgh Railway Company, at Washington, this 19th day of June, 1911, by leaving same at their office.

F. J. STAREK, *Marshal.*

Accepted by Guy F. Hurt for Thompson & Slater.

125 Certified copy of the foregoing citation on appeal served upon F. D. McKenney, Hibbs Bldg., the designated agent of the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, at Washington, this 17th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by F. D. McKenney.

Certified copy of the foregoing citation on appeal served upon C. N. Osgood, 606 Colorado Bldg., the designated agent of the Wheeling and Lake Erie Railroad Company and B. A. Worthington, receiver thereof, at Washington, this 19th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by J. H. Hinwood for C. N. Osgood.

Certified copy of the foregoing citation on appeal served upon C. N. Osgood, 606 Colorado Bldg., the designated agent of the Lake Shore and Michigan Southern Railway Company, at Washington, this 19th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by J. H. Hinwood for C. N. Osgood.

Certified copy of the foregoing citation on appeal served upon C. N. Osgood, 606 Colorado Bldg., the designated agent of the Pittsburgh and Lake Erie Railroad Company, at Washington, this 19th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by J. H. Hinwood for C. N. Osgood.

126 Certified copy of the foregoing citation on appeal served upon C. N. Osgood, 606 Colorado Bldg., the designated agent of the Buffalo and Susquehanna Railway Company and Harry I. Miller, receiver, Buffalo and Susquehanna Railway Company, at Washington, this 19th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by J. H. Hinwood for C. N. Osgood.

Certified copy of the foregoing citation on appeal served upon S. C. Wood, 501 Colorado Bldg., the designated agent of the Erie Railroad Company, at Washington, this 17th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by S. C. Wood.

Certified copy of foregoing citation on appeal served upon S. C. Wood, 501 Colorado Bldg., the designated agent of the Western Maryland Railway Company, at Washington, this 17th day of June, 1911.

F. J. STAREK, *Marshal.*

Accepted by S. C. Wood.

Certified copy of foregoing citation on appeal served upon J. N. Drake, 1110 F Street, the designated agent of the Pittsburgh, Shawmut and Northern Railroad Company and Frank Sullivan Smith, receiver thereof, at Washington, this 20th day of June, 1911, by leaving same at his office.

F. J. STAREK, *Marshal.*

Accepted by R. S. Knapp for J. N. Drake, agent.

127 UNITED STATES OF AMERICA, *ss:*

To the Baltimore and Ohio Railroad Company; the Pennsylvania Railroad Company; the Pennsylvania Company; Buffalo, Rochester and Pittsburgh Railway Company; the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; the Wheeling and Lake Erie Railroad Company and B. A. Worthington, receiver thereof; the Lake Shore and Michigan Southern Railway Company; the Pittsburgh and Lake Erie Railroad Company; Buffalo and Susquehanna Railway Company; Harry I. Miller, receiver, Buffalo and Susquehanna Railway Company; Erie Railroad Company; the Western Maryland Railway Company; the Pittsburg, Shawmut and Northern Railroad Company and Frank Sullivan Smith, receiver thereof, petitioners; greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal allowed and filed in the clerk's office of the United States Commerce Court, Washington, D. C., wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the order or

decree of the United States Commerce Court against the said United States as in the said petition of appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Martin A. Knapp, United States Circuit Judge and presiding judge of the United States Commerce Court in said cause, this 16th day of June, A. D. 1911.

[SEAL.] MARTIN A. KNAPP,
United States Circuit Judge and Presiding Judge of the United States Commerce Court in said cause.

Attest:
G. F. SNYDER,
Clerk U. S. Commerce Court.

A true copy.
Test:
G. F. SNYDER,
Clerk of the United States Commerce Court.

128 STATE OF MARYLAND,
City of Baltimore, County of Baltimore, ss:

Before me, the undersigned, a notary public in and for the county and State aforesaid, personally appeared J. Wesley Gilroy, who, being by me first duly sworn, makes oath and says that on the 1st day of July, A. D. 1911, at 10.30 a. m. of said day, at B. & O. Bldg., city of Baltimore, State of Maryland, he delivered a true copy of the citation, of which the annexed is a true copy, to Hugh L. Bond, jr.; and a true copy of the citation, of which the annexed is a true copy, to W. Irvine Cross, both persons being the solicitors of record for the petitioners in Baltimore and Ohio Railroad Company et al. v. United States, No. 39, United States Commerce Court.

J. WESLEY GILROY,
Deputy U. S. Marshal.

Subscribed and sworn to before me this 1st day of July, A. D. 1911.

[SEAL.] G. MORRIS BOND,
Notary Public for Maryland.

128a (Indorsement on cover:) File No. 22795, United States Commerce Court. Term No. 719. The Interstate Commerce Commission and The United States, appellants, vs. The Baltimore & Ohio Railroad Company, The Pennsylvania Railroad Company et al. Filed July 7, 1911. File No. 22795.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE INTERSTATE COMMERCE COMMISSION and the United States, appellants, *v.* THE BALTIMORE AND OHIO RAILROAD Company; The Pennsylvania Railroad Company et al.	No. 719.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this case and assign it for hearing during this term.

The case is in this court on appeal from an interlocutory order or decree of the Commerce Court, granting, without opinion, a preliminary injunction against enforcement of an order of the Interstate Commerce Commission.

The order thus enjoined prohibited the railroad companies concerned—

(1) From maintaining rates on coal if to be used for steam purposes different from rates on the same coal if to be used for other purposes; and

(2) From allowing a different rate over railroad lines to coal owned by other railroad lines than to coal of any other shipper.

An early determination of these two questions, and also of the further question whether the preliminary injunction was justified, is deemed important to the public interest.

The priority suggested is authorized by section 2 of the act of June 18, 1910 (36 Stat. L., Pt. I, c. 309, p. 542).

I am authorized to state that both the Interstate Commerce Commission, coappellant, and the appellees concur in this motion.

FREDERICK W. LEHMANN,
Solicitor General.

NOVEMBER, 1911.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE INTERSTATE COMMERCE COMMISSION and The United States, appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY; The Pennsylvania Railroad Company; The Pennsylvania Company; Buffalo, Rochester and Pittsburgh Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; The Wheeling & Lake Erie Railroad Company, and B. A. Worthington, Receiver Thereof; The Lake Shore and Michigan Southern Railway Company; The Pittsburgh and Lake Erie Railroad Company; Buffalo and Susquehanna Railway Company; Harry I. Miller, Receiver, Buffalo and Susquehanna Railway Company; Erie Railroad Company; The Western Maryland Railway Company; The Pittsburg, Shawmut and Northern Railroad Company and Frank Sullivan Smith, Receiver Thereof, appellees.

In Equity, No. 719.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This case comes here by appeal from an interlocutory decree of the Commerce Court, enjoining enforcement of an order of the Interstate Commerce Commission, dated February 24, 1911, the body of which reads:

> This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon:
>
> *It is ordered*, That the above-named respondents and intervenors be, and they are hereby, directed, on or before the 15th day of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from their present practice of maintaining and using tariffs on coal the rates in which are restricted to shipments of or for certain consignors or consignees, or when the coal transported is for a particular use.
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> *It is further ordered*, That said respondents and intervenors be, and they are hereby, directed, on or before said 15th day of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from maintaining any rates on coal which are applicable only to the shipments of certain consignors

> or consignees, or when the coal transported is put to a designated use, and which rates are not open alike for all shippers.
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> (Rec., 26–27.)

The order was entered, after full hearing and investigation had, in a proceeding instituted by the Commission on its own motion, for the purpose of determining whether tariffs filed with the Commission by the carriers who are appellees herein and by other carriers, and practices indulged in under such tariffs, whereby the carriers apply to the transportation of what is known as railroad-fuel coal rates which are less in each instance than the rates the carriers contemporaneously exact for the transportation of other coal of like character, over the same line, in the same direction, and between the same points, were in violation of any of the provisions of the act to regulate commerce.

In describing the issue in the proceeding before it, the Commission said:

> In the territory east of Illinois and north of the Ohio River carriers quite generally have followed the practice of filing and using tariffs which named rates for the transportation of coal when for railroad use lower than the rates applicable to the transportation of commercial coal between the same points. The underlying question has been before the Commission in various forms many times and this proceeding was instituted by the Commission for the purpose of considering it at this time and in a formal way. The Pennsylvania Railroad

> Company and the Baltimore & Ohio Railroad Company were made defendants to this proceeding, but numerous other railroads have intervened, so that most of the coal-producing railroads in the east are parties, as well as some railroads which do not originate their own fuel supply.
>
> The tariffs referred to vary greatly in their definition or description of the transportation covered thereby. Sometimes it is provided that the rate will apply to coal when consigned to a particular junction point to a named railroad company; sometimes when for use upon the locomotives of a named railroad; sometimes when for railroad purposes. The question for consideration therefore is whether or not a railroad may grant rates applicable to the transportation of property consigned to a railroad company, or for railroad use, different from the rates contemporaneously applied to the transportation of the same commodity between the same points when consigned to or for the use of others than railroad companies. (Rec., 8–9.)

After describing the circumstances and conditions pertaining to the transportation of railroad-fuel coal as compared with the transportation of other coal, and after calling attention to the language of section 2 of the act and pointing out that the difference in circumstances and conditions must be substantial in order to justify a disparity in rates, the Commission made further statements as follows:

There can be no substantial difference in the conditions of transportation of this railway-fuel coal from a point on the producing line to a point on the consuming line as compared with the transportation of commercial coal between those same points. There may be a slight difference in the terminal service required at destination, but that is true as to all shipments to any point of importance. It requires more and somewhat more expensive service to deliver one shipment than to deliver another, but that difference is not at all recognized in the rates, which are the same. The difference in transportation conditions must be substantial in order to remove the application of section 2 of the act. If a lower rate upon railway-fuel coal is warranted because the railroad has facilities for receiving coal which make the cost of the service less, any shipper who provided like facilities must be entitled to the same rate accorded the railway. Obviously we should not permit a lower rate to a large shipper who has provided facilities for the prompt unloading of his traffic than is at the same time accorded to his smaller competitor who is not able to provide and who does not need such facilities. If that were done and it were finally held that it did not constitute violation of section 2 of the act, it would constitute clearly unjust discrimination in violation of section 3 of the act. (Rec., 16.)

There are few commodities that are not purchased and used directly or indirectly by railroads, and if a railroad were accorded special or favored rates as compared with

> other shippers discriminations such as that cited would be injected into almost every field of commerce and nearly every locality of production or manufacture.
>
> The tariffs which contain rates applicable only to the shipments of certain consignees or when the commodity is put to a particular use and the rates which are so restricted to the use of certain shippers and not open to all shippers alike are in violation of section 2 of the act, and unjustly discriminatory, in violation of section 3 of the act, and therefore unlawful. (Rec., 18.)

The case was tried in the Commerce Court upon bill and answer and certain affidavits submitted on behalf of the carriers. An answer under oath was not waived in the bill, and the answer of the Commission was sworn to on behalf of the Commission by Commissioner Clark. (Rec., 41–45.)

Aside from descriptions of the parties and some other matters which it is not necessary to mention here in detail, the allegations of the bill may be summarized as follows:

The movement of the railroad-fuel coal on the lines of the carriers transporting it from the point of origin to the point of junction with the lines of the carrier for whose use the coal is intended differs from the movement of shipments of coal to be delivered locally at such junction point, in the following particulars: (*a*) At the junction, the railroad-fuel coal is delivered on exchange tracks used for through shipments, while the other coal is delivered

on sidetracks. (*b*) Free time is allowed for unloading such other coal, but not for unloading railroad-fuel coal. (*c*) In connection with the car and its contents, the delivering carrier is relieved from all cost and responsibility from the time of delivery where the traffic is railroad-fuel coal, but a contrary condition exists where the traffic is such other coal. (Rec., 3.)

Charges for the transportation of the railroad-fuel coal on the line of the carrier which uses the coal go to such carrier, regardless of whether the coal moves under a through rate. (Rec., 3.)

All but an inconsiderable part of the railroad-fuel coal is necessary and intended for use as fuel for locomotives, and at the time the coal is shipped from point of origin it is not possible for the consuming carrier to tell at what point it will be needed. (Rec., 3.)

There is no commercial competition between railroad-fuel coal and other coal. (Rec., 4.)

The rates applied to railroad-fuel coal are open and available to all producers and shippers. (Rec., 4.)

The Commission did not consider it necessary to consider any specific tariff or tariffs or the rates named thereby. The Commission was of the opinion that the facts, circumstances and conditions surrounding, attaching to or affecting traffic in railroad-fuel coal and not attaching to or affecting traffic in other coal could not lawfully be considered by it as distinguishing the railroad-fuel coal from such other

coal. The facts are undisputed. The question of degree of difference or distinction justified by the facts was not considered by the Commission. (Rec., 6.)

In assigning errors made by the Commission the carriers in their bill, among other things, said:

> The Commission erred in holding that the rates fixed by the said tariffs for transportation to the junction point on shipments of coal going on to the line of the connecting carrier for further movement by it must under the provisions of section 2 of the act to regulate commerce be no more and no less than the rates charged on shipments of coal from the same origin for local delivery at said junction point. (Rec., 5.)

In substance, the allegations, admissions and denials contained in the Commission's answer are:

In each instance the allegations contained in paragraph 3 of the bill relate to comparisons between coal on the one hand, consigned to a railroad company, and coal on the other hand, consigned to some other party. The former is called railroad-fuel coal and the latter is known as commercial coal. In each instance, however, regardless of the name of the consignee, the point of origin and point of destination of the shipment of coal transported by the petitioners, where the traffic is railroad-fuel coal, is the same as where the traffic is commercial coal; but the rate or charge exacted in each instance by the petitioners for the transportation of railroad-fuel coal over their respective lines of railway from

certain points of origin to certain points of destination is much less than the rate or charge contemporaneously exacted by said petitioners for the transportation of commercial coal over the same line in the same direction and between the same points. Schedules or tariffs providing for such differences in rates and in the application of the rates have heretofore been established and put in force and are now maintained and enforced by petitioners.

Where, under the rate applied, the destination is a junction which is a point of connection between the lines of two or more of the petitioners, the movement of the coal, regardless of whether it is railroad-fuel coal or commercial coal, is the same, except that at said destination the cars containing railroad-fuel coal are ordinarily placed upon what is known as an exchange track, which is used in common by the connecting carriers, while the cars containing commercial coal are usually placed upon a sidetrack of the delivering carrier. The cost of making delivery is practically the same whether the delivery relates to railroad-fuel coal or to commercial coal, depending upon the nature of the delivery facilities furnished by the petitioners. Therefore, the cost in some instance of delivering the railroad-fuel coal may be and is less than the cost of delivering the commercial coal, and it is also true that in some instances the cost of delivering the commercial coal may be and is less than the cost of delivering the

railroad-fuel coal. In this connection, however, respondent alleges that the differences as between railroad-fuel coal on the one hand, and commercial coal on the other hand, are similar to the differences pertaining to some shipments of commercial coal as compared with other shipments of commercial coal.

Generally, what is known as "free time" is allowed by the petitioners; that is to say, a certain period of time for unloading the coal is allowed, and if the coal is unloaded within that time no charge for the use of the car in which the coal is shipped is made in addition to the charge included in the transportation rate; but if that time is exceeded, a charge, in addition to said rate, of $1 for each day or fraction of a day in excess of the free time, known as a demurrage charge, is exacted and collected by the petitioners, while the compensation paid by one carrier to another carrier for the use of the car owned by the latter is 25 cents per day; but where the coal transported is railroad-fuel coal, no free time is allowed, nor is such demurrage charge exacted or collected. These differences, however, are offset, and much more than offset, by the differences in rates of transportation hereinbefore described.

Where the destination of the shipments of coal is not a point of connection between the lines of two or more of the petitioners, the circumstances and conditions pertaining to the transportation and delivery of the coal are the same in substance as those above described, except that at such destination there are no exchange tracks used in common by two or more

of the petitioners, and where the shipment passes over more than one line of railway to such destination delivery by one of the petitioners to another of the petitioners is made in the same way and under similar circumstances and conditions, regardless of whether such delivery pertains to railroad-fuel coal or to commercial coal.

The lower rates established by the petitioners and applied by them to the transportation of railroad-fuel coal as hereinbefore described are not open alike to all shippers, but are instead in and by the schedules and tariffs above mentioned, and by reason of the practices of the petitioners, confined to shippers of railroad-fuel coal and denied to shippers of all other coal, including commercial coal.

Respondent denies the truth of the statement contained in paragraph 6 of the bill that "the Commission erred in holding that the rates fixed by the said tariffs for transportation to the junction point on shipments of coal going onto the line of the connecting carrier for further movement by it must under the provisions of section 2 of the act to regulate commerce be no more and no less than the rates charged on shipments of coal from the same point of origin for local delivery at said junction point." On the contrary, respondent alleges that, as shown on pages 24 and 25 of the bill, in respondent's report, which is included in Exhibit A to said bill, respondent said:

> We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have

said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination.

Respondent is informed and believes and thereupon alleges that in making the order which is the subject matter of this suit and in the investigation upon which said order was and is based, respondent examined thoroughly and considered carefully every fact, circumstance, and condition called to its attention by the petitioners and every other pertinent fact, circumstance, and condition, including degrees of difference and distinction, and each of and all the tariffs and rates of the petitioners which are affected by said order, and that in connection with such examination and consideration respondent did not entertain the opinion that, as stated in paragraph 10 of the bill, the facts, circumstances, and conditions surrounding, attaching to, and affecting the traffic in railroad-fuel coal and not attaching to and affecting traffic in other coal, could not lawfully be considered by respondent as distinguishing the traffic in railroad-fuel coal from the traffic in other coal.

Respondent denies the truth of each of and all allegations contained in said bill, except to the extent that the truth of said allegations is admitted in the answers thereto hereinabove made by respondent.

Respondent alleges that all the traffic hereinbefore described, and all the traffic to which said order relates, is traffic transported by the petitioners from

one State or Territory of the United States or the District of Columbia to another State or Territory of the United States or the District of Columbia, and is therefore interstate.

By reason of the premises, respondent alleges that said railroad-fuel coal as compared with said other coal, including commercial coal, is a like kind of traffic; and that the aforesaid services performed by the petitioners in and in connection with the transportation of said railroad-fuel coal, as compared with the services performed by the petitioners in and in connection with the transportation of said other coal, including commercial coal, are like and contemporaneous and are performed by petitioners under substantially similar circumstances and conditions.

By reason of the matters above set forth, and the practices hereinbefore described, respondent alleges that the petitioners have been and are charging, demanding, collecting, and receiving from certain persons a compensation greater than the compensation they have been and are charging, demanding, collecting, and receiving from other persons for like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions, in violation of section 2 of the act to regulate commerce, and have been and are giving undue and unreasonable preference and advantage to railroad-fuel coal and the traffic therein, and to shippers and owners thereof, and have been and are subjecting to undue and unreasonable prejudice and disadvantage other coal, including

commercial coal, and the traffic therein, and the shippers and owners thereof, in violation of section 3 of said act.

Respondent further alleges that all the allegations contained in said petition relate to matters within the jurisdiction of this respondent under said act and are covered by the aforesaid report and order of respondent; that the findings of fact made by respondent and contained in said report and order relate only to matters within said jurisdiction, and that therefore the correctness of said findings of fact is a matter which is not open to review in this or any other court. (Rec., 41–45.)

The affidavits referred to were made by coal dealers and officers of coal dealers, who represent that such dealers will suffer loss and be injured if the preferential rates accorded to railroad-fuel coal are canceled. These affidavits show that where coal is transported by carriers between certain points, discriminations in rates per ton exacted for the transportation are:

Railroad-fuel coal.	Other coal.
$1.30	$1.95
.72½	1.15
1.34	1.90
1.34	1.70

(Rec., 33–40.)

After the case was argued orally before the Commerce Court, that court entered the interlocutory decree from which an appeal was taken as aforesaid. The Commerce Court did not, however, deliver any

opinion, either oral or written, nor did it refer to any evidence, or make any finding of fact or other statement tending to show wherein, in making the order, the Commission had exceeded its power. The assignment of errors is therefore based upon the assumption that the Commerce Court held against the Commission on every issue of law and of fact made by the pleadings of the parties. Said assignment is as follows:

1. The court erred in not dismissing the petition for want of equity.

2. The court erred in granting the temporary injunction enjoining enforcement of the order of the Commission for the following reasons:

(*a*) That said petitioners have not, nor has any of them, in and by their said petition shown that the legislative department of the Government of the United States is or ever has been without power to grant the authority exercised by the Commission in making said order.

(*b*) That said petitioners have not, nor has any of them, in and by said petition shown that said legislative department did not duly confer upon the Commission the authority exercised by the Commission in making said order.

(*c*) That said petitioners have not, nor has any of them, in and by said petition shown that the subject matter of said order is not within the jurisdiction conferred upon the Commission by said legislative department.

(*d*) That said petitioners have not, nor has any of them, in and by said petition shown that in making said order the Commission exercised authority in excess of the authority conferred upon it by said legislative department.

(*e*) That said petitioners have not, nor has any of them, in and by said petition shown that in making said order the Commission exercised either unreasonably or unlawfully the authority, or any of the authority, conferred upon it by said legislative department.

(*f*) That said petitioners have not, nor has any of them, in and by said petition shown that in making said order the Commission violated any constitutional or other right of said petitioners, or of any of said petitioners, over which the Commerce Court exercised or may exercise jurisdiction.

3. The court erred in holding that the practice of the petitioners whereby they transport railroad-fuel coal, in carloads, over their lines of railway between certain points, for compensation which is less in each instance than the compensation they contemporaneously exact for the transportation, in carloads, of other coal, including commercial coal, over the same lines of railway, in the same direction and between the same points, is not a violation of section 2 of the act to regulate commerce.

4. The court erred in holding that the tariffs published and filed by the petitioners, wherein and whereby it is provided that the rates to be charged in each instance for the transportation of railroad-

fuel coal, in carloads, over the petitioners' lines of railway between certain points, shall be less than the rates contemporaneously exacted by petitioners for the transportation, in carloads, of other coal, including commercial coal, over the same lines of railway, in the same direction and between the same points, do not provide for the discrimination prohibited by said section 2.

5. The court erred in holding that the practice and discrimination aforesaid do not constitute the undue preference and undue prejudice prohibited by section 3 of said act.

6. The court erred in holding that where discrimination is made as aforesaid by the petitioners, it may be justified by showing that said railroad-fuel coal is shipped by one party, and that said other coal is shipped by another and different party.

7. The court erred in holding that where discrimination is made as aforesaid by the petitioners, it may be justified by showing that the consignee of said railroad-fuel coal is one party, and that the consignee of said other coal is another and different party.

8. The court erred in holding that where discrimination is made as aforesaid by the petitioners, it may be justified by showing that said railroad-fuel coal is to be used for one purpose, and that said other coal is to be used for another and different purpose.

9. The court erred in holding that it is proper to consider how and by whom the coal transported is handled previous to the time when it is offered to the petitioners for transportation at point of origin,

in determining whether or not said railroad-fuel coal is transported by petitioners under circumstances and conditions which are substantially similar to the circumstances and conditions pertaining to the transportation by the petitioners of said other coal.

10. The court erred in holding that it is proper to consider how and by whom the coal transported is handled subsequent to the time when it is delivered by the petitioners to the consignee at point of destination, in determining whether or not said railroad-fuel coal is transported by petitioners under circumstances and conditions which are substantially similar to the circumstances and conditions pertaining to the transportation of said other coal.

11. The court erred in holding that the practice and discrimination aforesaid may be justified by showing differences in circumstances and conditions, arising after the coal is tendered by the consignor to petitioners for transportation at point of origin and before it is delivered by petitioners to the consignee at point of destination, which are wholly artificial and entirely created by the petitioners.

12. The court erred in substituting its own judgment for the judgment of the Commission concerning the question of whether or not said railroad-fuel coal, as compared with said other coal, is a like kind of traffic.

13. The court erred in substituting its own judgment for the judgment of the Commission concerning the question of whether or not the transportation services performed by the petitioners as aforesaid, in

and in connection with the transportation of said railroad-fuel coal, as compared with the services performed by the petitioners as aforesaid, in and in connection with the transportation of said other coal, are like and contemporaneous.

14. The court erred in substituting its own judgment for the judgment of the Commission concerning the question of whether or not the services performed by the petitioners as aforesaid, in and in connection with the transportation of said railroad-fuel coal as aforesaid, as compared with services performed by the petitioners as aforesaid, in and in connection with the transportation of said other coal, are performed by petitioners under substantially similar circumstances and conditions.

15. The court erred in substituting its own judgment for the judgment of the Commission concerning the character of the discrimination and preference and prejudice aforesaid.

16. The court erred in making the order granting the temporary injunction for the following reasons:

(*a*) The court did not, in accordance with section 3 of the Commerce Court act of June 18, 1910, state that irreparable damage to said petitioners, or to one or more of them, would result if the order were not made and such injunction granted.

(*b*) The court did not, in accordance with said section 3, include in said order a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage

would result if the order were not made and such injunction granted.

(*c*) The court did not, in accordance with said section 3, specify in said order the nature of such damage.

(Rec., 50–53.)

POINTS.

I.

THE COURT ERRED IN NOT DISMISSING THE BILL FOR WANT OF EQUITY.

The first two assignments are general, and are to the effect that there is no equity in the bill.

The only allegations in the bill which it can be claimed tend to show that the Commission, in making the order, acted beyond its power are those included in paragraph 10 (Rec., 6), that the Commission did not find it necessary to consider any specific tariff or tariffs or the rates named thereby; that the Commission was of the opinion that the facts, circumstances and conditions surrounding, attaching to or affecting the traffic in railroad-fuel coal and not attaching to or affecting traffic in other coal, could not lawfully be considered by it as distinguishing the former traffic from the latter traffic, and that the question of degree of difference or distinction justified by the facts was not considered by the Commission.

But, as above shown, these allegations, besides being inconsistent with the statements included in the Commission's report, are specifically denied in the Commission's answer, which, under the cir-

cumstances, must be taken as true. We have shown that an answer under oath was not waived in the bill, and that the answer was sworn to on behalf of the Commission by Commissioner Clark, who wrote said report.

That these allegations are merely inferences of the pleader is conclusively established by the record. In said paragraph 10 (Rec., 6), the carriers alleged that, "The facts are undisputed." And since at the time that allegation was made no answer to the bill had been filed, it is evident that the carriers understood they were not denying any fact included, or alleging any fact not included, in the report of the Commission.

But treating the allegations as allegations of fact would make no difference with the result, because no evidence was submitted to the court in this connection by the carriers, after the answer denying the truth of the allegations was filed as aforesaid.

We therefore insist that, in failing to dismiss the bill for want of equity, and in granting the temporary injunction, the Commerce Court committed errors which should be corrected by a reversal of said decree.

It is true that in paragraph 3 of their bill (Rec., 3), the carriers made allegations for the purpose of showing, apparently, that the Commission compared traffic in commercial coal destined to a junction point with traffic in railroad-fuel coal destined

to a point beyond the junction, and upon such allegations based certain conclusions contained in paragraph 6 of the bill (Rec., 5); but in this connection, as above shown, the Commission said:

> We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination. (Rec., 16.)

Therefore, the contention of the carriers concerning different destinations, being without foundation in fact, is untenable and of no importance.

II.

THE COURT ERRED IN HOLDING THAT, AS A MATTER OF LAW, THE CIRCUMSTANCES AND CONDITIONS PERTAINING TO THE TRANSPORTATION OF THE RAILROAD-FUEL COAL ARE SUBSTANTIALLY DIFFERENT FROM THE CIRCUMSTANCES AND CONDITIONS PERTAINING TO THE TRANSPORTATION OF SAID OTHER COAL.

Assignments 3 to 11, inclusive, relate to the tariffs and practices of the carriers, which were condemned by the Commission, and to differences in circumstances and conditions, which the carriers contend are sufficient to establish their right to make the disparities in rates, upon which the order of the Commission is based. And it will be observed that

the circumstances and conditions referred to may be summarized under three separate heads, as follows:

(1) Those arising before the traffic is delivered by the consignor to the carrier for transportation at point of origin.

(2) Those arising after the traffic is delivered by the carrier to the consignee at point of destination.

(3) Those arising after the traffic is delivered by the consignor to the carrier at point of origin and before it is delivered by the carrier to the consignee at point of destination, but which are wholly artificial and entirely created by the carriers.

Concerning matters covered by the first two paragraphs of the summary it is not necessary to make an extended argument, because this court has ruled repeatedly that such matters cannot be used to justify disparities in rates, where, as in this case, the transportation is over the same line, in the same direction, and between the same points.

Wight v. *United States*, 167 U. S. 512, 518;

Int. Com. Com. v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 166–167;

Int. Com. Com. v. *Delaware, Lackawanna & Western R. R. Co.*, 220 U. S. 235, 252–254.

And if the matters included in the third paragraph of the summary may be used to justify such disparities, it is difficult to see how a carrier can be prevented from indulging in such discriminations as it may wish to make, to the extent at least, of charging one party a rate greater than the rate it contemporaneously

accords to another party, for the transportation of a like kind of traffic, over the same line, in the same direction, and between the same points.

The only differences of this nature pointed out by the carriers are those mentioned in paragraph 3 of their bill and hereinabove referred to. They say the cost to a carrier of transporting railroad-fuel coal from a point of origin to a junction point is less than the cost to the carrier of transporting other coal between the same points, because, (*a*) At the junction, the railroad-fuel coal is delivered on an exchange track, while other coal is delivered on a sidetrack. (*b*) Free time is allowed in connection with the transportation of said other coal, but not in connection with the transportation of railroad-fuel coal. (*c*) In connection with the car and its contents, the delivering carrier is relieved from all cost and responsibility from the time of delivery where the traffic is railroad-fuel coal, but a contrary condition exists where the traffic is such other coal.

They do not say placing a car loaded with coal on a sidetrack involves, to the carrier, greater expense than placing the same car on an exchange track would involve, and the Commission, in its answer, as above shown, has stated why they could not consistently do so. The expense to the carrier would depend upon the nature of the facilities provided by the carrier. If the sidetrack were nearer than the exchange track to the breaking-up yard the expense of placing the car on the sidetrack would, other things

being equal, be less than if delivery of the car were made instead upon the exchange track, and *vice versa*.

This difference, however, is the same as, and not different from, the difference which always exists where delivery on more than one sidetrack is necessary, and, as a practical matter, disparities in rates cannot be permitted simply because differences in cost to the carrier, like those under consideration, exist. Common knowledge establishes that the force of this proposition is fully appreciated by the carriers, who, by their practices, have always shown that they believe it to be sound and think it is the only principle which can properly be applied in the premises in the fixing of transportation rates, where the facilities used are those provided by the carrier. If a different method of procedure were adopted and followed the rates applied to the transportation of a particular kind of traffic between certain points might be as numerous as the carrier, to serve its own interests, or for some other purpose, might see fit to arrange for and make. This, to say the least, would be objectionable. Also, it would, in its operation, so amend section 2 of the act to regulate commerce as to make the word "substantially" a synonym for the word "exactly."

What is said above concerning delivery by the carrier of traffic at points of destination may be applied as well, of course, to receipt by the carrier of shipments at points of origin.

In their bill the carriers do not explain what is meant by the term "free time," but we have seen

that, in its answer, the Commission has supplied this and other necessary information. It states that free time is a period of time allowed for unloading the coal at points of destination; that if the coal is unloaded within that time no charge for the use of the car in which the coal is shipped is made, in addition to the charge included in the transportation rate; that if the free time is exceeded, a charge, in addition to said rate, of $1 for each day or fraction of a day in excess of such time, known as a demurrage charge, is exacted and collected by the carriers, while the compensation paid by one carrier to another carrier for the use of a car owned by the latter is only 25 cents per day.

Under these circumstances it will be seen that, if the free time is 48 hours and two cars, one loaded with railroad-fuel coal, and the other loaded with what is herein called commercial coal, are delivered by a carrier at a point of destination and not unloaded and released until the period of 48 hours has elapsed, the difference in expense in favor of railroad-fuel coal and against commercial coal will be 50 cents per car, or approximately 1 cent per ton, while differences in rates in favor of railroad-fuel coal and against commercial coal, applied by the carriers range, as hereinbefore shown, from 36 cents to 65 cents, per ton. Of course if the cars were released at the end of 24 hours the difference against commercial coal would be only 25 cents per car, or about ½ of a cent per ton.

But if the cars were not released until the end of 4 days there would be a great difference in the result.

The delivering carrier would collect $2 in demurrage charges for the use of the car containing commercial coal, while for the use of the car containing railroad-fuel coal it would collect only $1. If the cars were not released until a week had elapsed the difference in favor of commercial coal and against railroad-fuel coal would be $3.25, and the court will probably take judicial notice of the fact that coal is not always unloaded promptly at points of destination.

In this connection it may be said that an exchange such as is usually made by and among carriers would give the delivering carrier a car to use while its own car was detained under load, and that the delivering carrier would be more benefited by such use than by the demurrage charges collected on the shipment of commercial coal, but while this might be true in times of car shortage it is apparent that it would not be true at other times.

The difference in risk assumed by the delivering carrier must, in the nature of things, be very small. So far as the contents of the cars are concerned, we are unable to observe any difference at all; and the damage to a car which is likely to take place while the car is standing on a sidetrack loaded is of such small proportions, when compared with the number of cars loaded with coal and placed on sidetracks, according to common knowledge, that we believe occupying time and space in discussing the probabilities pro and con would be unjustifiable.

The above are the only differences specifically mentioned by the carriers in support of their con-

clusion that the cost of transporting commercial coal is greater than the cost of transporting railroad-fuel coal, but they call attention to some other matters which they claim should be considered in determining whether, as a matter of law, the shipments compared are a like kind of traffic and transported under substantially similar circumstances and conditions.

They say that charges for the transportation of railroad-fuel coal on the line of the carrier which uses the coal go to such carrier, regardless of whether the coal moves under a through rate. And from this they argue that where such coal moves under a through rate to a point of destination on the line of the carrier which uses it, from a point of origin on the line of another carrier, it actually moves on the line of such other carrier under the division of the through rate which goes to that carrier.

It is undoubtedly true that a carrier may transport its own property at will from one point to another upon its own line, regardless of the rates named in its published schedules, provided the title to that property does not change while the property is in transit. It is also true that the divisions of a through rate for the transportation of property from a point of origin on the line of one carrier to a point of destination on the line of another carrier are a matter of agreement by and between the carriers who perform the transportation services. But it is not true that the carrier who uses the property may, for the purpose of ob-

taining, for the transportation of the property from such point of origin to a point of intersection between its own line and the line of such other carrier, a rate which is less than the rate contemporaneously exacted from other shippers for the transportation of a like kind of property from said point of origin to said point of intersection, ship the property from such point of origin to a point of destination on its own line, under a through rate published and filed and made applicable to such transportation, and, when the property reaches its own line, either use the property at such point of intersection or transport it to a point on its own line other than the point to which such through rate applies, and then pay for the transportation from such point of origin to said point of intersection, not the rate applicable to the transportation between those points, but the division of the through rate which goes to such other carrier, as aforesaid. And if it does so it thereby subjects itself to the penalties provided for in the act and made applicable to cases of false billing and misrepresentation.

The carriers say next that all but an inconsiderable part of the railroad-fuel coal is necessary and intended for use as fuel for locomotives, and that at the time the coal is shipped it is not possible for the consuming carrier to tell at what point it will be needed.

In view of the pertinent decisions of this court hereinbefore referred to it does not seem necessary

to point out why the lawfulness of a discrimination in rates for the transportation of property may not be made to depend upon, either the use to be made of the property after it has been transported between certain points, or the fact that at the time the property is shipped from point of origin the shipper does not know where it will be used. It is evident that both of those matters are outside of and beyond, and do not in any way affect, the transportation.

The carriers also say that there is no commercial competition between railroad-fuel coal and other coal.

If this be true, the condition has been created, apparently, by the preferential rates and discriminating practices which form the basis of the Commission's order; and to say that carriers may, by arrangements by and among themselves, remove competition, and afterwards indulge lawfully in discriminations which would be unlawful if such competition had not been removed, would be equivalent to saying that they may be permitted to take advantage of their own wrong.

But even if it were established that such competition does not exist, and that its absence is not attributable to any action of the carriers, those circumstances would have no bearing upon the matters here involved; because this is a case where neither the presence nor absence of competition can be used to justify a discrimination which would otherwise constitute a violation of the prohibition contained in section 2 of the act.

In *Wight* v. *United States*, *supra*, this court, speaking through Mr. Justice Brewer, said:

> It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.
>
> It may be that the phrase "under substantially similar circumstances and conditions," found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition. (Id. 518.)

The carriers say further that the rates applied to railroad-fuel coal are open and available to all producers and shippers. They qualify this statement, however, by adding that the railroad-fuel rates are applicable only on shipments to which the special conditions mentioned in paragraph 3 of their bill apply.

That the railroad-fuel rates are not open or available to all producers and shippers is clearly shown, not only by the matters set forth, as aforesaid, in said paragraph 3, but also by certain statements contained in the Commission's report.

In this connection the Commission, in its report, said:

> The tariffs referred to vary greatly in their definition or description of the transportation covered thereby. Sometimes it is provided that the rate will apply to coal when consigned to a particular junction point to a named railroad company; sometimes when for use upon the locomotives of a named railroad; sometimes when for railroad purposes. (Rec., 9.)

It is apparent that the railroad-fuel rates, in any event, would be open and available only to producers and shippers from whom the carriers might see fit to purchase coal.

In the last subdivision of said paragraph 3 (Rec., 4), the carriers aver that the preferential rates and discriminating practices which form the basis of the Commission's order have been in effect for several years, and in paragraph 11 of their bill (Rec., 6–7), they picture in forcible language the losses that they claim will be sustained by them and others, if a cancellation of said rates and a discontinuance of said practices are now required.

It is true that in the past the carriers who are appellees herein have from time to time published and filed such preferential rates, and have also indulged in said discriminating practices, but in doing so they disregarded many rulings made and several decisions rendered, by the Commission, as will be seen from an examination of the Commission's report. (Rec., 9–10, 13–14.)

In the case of *The Capital City Gas Company* v. *The Central Vermont Railway Company et al.*, it was shown that the Central Vermont Railway Company and The Rutland Railroad Company had established a joint rate of 90 cents per ton for the transportation of bituminous coal from Norwood, N. Y., to Montpelier, Vt., but had restricted the application of that rate to coal intended for "railroad supply," and exacted for the transportation of other coal between the same points a combination rate of $1.85 per ton. The ruling of the Commission is shown in the syllabus, and is as follows:

> The phrase "under substantially similar circumstances and conditions" in section 2 of the act to regulate commerce refers to the matter of carriage, and it is not permissible under that section for two or more carriers to establish a joint through rate, less than the sum of their locals, which is applicable only to a particular shipper or class of shippers, while denying such lower rate to other shippers of like traffic between the same points of origin and destination.
>
> Defendants' joint rate of 90 cents per ton on bituminous coal from Norwood, N. Y., to Montpelier, Vt., when intended for "railroad supply" and their combination rate of $1.85 per ton, applied on such coal carried between the same points and used for manufacturing or any other industrial or domestic use, constitute unlawful discrimination. (11 I. C. C. Rep., 104.)

In a unanimous opinion of the Commission, delivered by Chairman Knapp, the present presiding

judge of the Commerce Court, the Commission, in announcing its conclusions, after having recited facts as above, said:

> We are constrained to hold that these facts, which are wholly undisputed, establish a discrimination forbidden by the second section of the act. In transporting bituminous coal from Norwood to Montpelier at 90 cents a ton for "railroad supply" the same service is performed and the circumstances and conditions of carriage are the same in every material respect as in transporting coal at $1.85 per ton for complainant and other consignees. This appears to be conceded since no proof was offered that the fact is otherwise. It follows, as we think, that the difference in rates is a violation of the statute.
>
> * * * It is not permissible under this section for two or more carriers to establish a joint through rate, less than the sum of their locals, which is available only to a particular shipper or class of shippers, while denying such lower rate to other shippers of like traffic between the same points of origin and destination. In such case it may be said that the law presumes a common injury to those compelled to pay the higher rate because of the concession to the interest favored. If these defendants obtain only reasonable returns from their entire coal traffic, it may well be claimed that the rates charged complainant and other Montpelier consumers are higher than they would be but for the much lower rates allowed on coal for "railroad supply."

> Moreover, if this view is correct, the absence of actual prejudice to complainant would not excuse the defendants. The most salutary law may doubtless be disregarded in some cases without injury and inflict a degree of hardship in other cases by its enforcement. (Id. 106–107.)

To the same effect see: *In the Matter of Contracts of Express Companies for Free Transportation of their Men and Materials over Railroads,* 16 I. C. C. Rep. 246; *Hitchman Coal & Coke Company* v. *Baltimore & Ohio Railroad Company,* 16 I. C. C. Rep. 512.

Of course the preferential rates were established to give certain carriers an opportunity to make shipments of coal from mines they might not otherwise be able to reach and enable them to buy coal at prices lower than those other shippers and consumers are compelled to pay, and if those advantages are now taken away it is probable that the carriers who have been favored in the past will, to some extent, sustain losses. Such losses, however, cannot consistently be called a legal injury.

It is contended, though, that the advantages enjoyed by such carriers do not harm anybody else.

In this connection the Commission, in its report, said:

> Ordinarily the railroad does not compete with a private consumer of coal but it may happen that the railroad is a manufacturer in competition with private enterprises and in that event its fuel so used would have borne a

different rate from that used by the private factory. (Rec., 12–13.)

Obviously if a carrier as a shipper over the lines of another railway may be accorded preferential rates on its fuel the same rule must extend to all other supplies purchased and shipped by railroads. As an example of how this would probably work out we will assume a railroad at Chicago that desires to purchase for its own use a large quantity of lumber. It may secure that lumber from Oregon or Washington or from the yellow-pine fields of the south. The commercial rates on lumber from these widely separated and important fields to Chicago are adjusted with regard to competition between points of production, between carriers, and between markets. If the railroad is required to pay the same rate that any other shipper would pay it is not able to create any unjust discrimination. If, however, it may have special rates on its lumber because it is a railroad, it, like any other shipper, would use the fact that it had a large tonnage to move as a leverage with which to secure the most favorable rates possible. It would then become a question of arrangement between it and other railroads as to which would give it the most advantageous rate, and the bargain which it was so able to drive would determine whether it would buy the lumber in the northwest, in the southwest, or in the southeast. Its favored rates would create unjust discrimination between localities and between persons having lumber for sale.

> There are few commodities that are not purchased and used directly or indirectly by railroads, and if a railroad were accorded special or favored rates as compared with other shippers discriminations such as that cited would be injected into almost every field of commerce and nearly every locality of production or manufacture. (Rec., 18.)

This explains why the Commission found that the preferential rates and discriminating practices which form the basis of the order whose enforcement was enjoined by the Commerce Court constitute a violation, not only of the prohibition against unjust discrimination contained in section 2 of the act, but also of the prohibitions against undue preference and undue prejudice contained in section 3 of the act.

It is apparent that the principle involved in this suit is far-reaching in its effect, and therefore of great importance to the public. In view of the matters above referred to, and because of other reasons which will readily occur to the court, we believe it cannot be consistently said that if the carriers are permitted to continue in force the aforesaid rates and practices no one will be harmed. On the contrary, we think it clearly appears that such continuance will inevitably result in general demoralization and create the unfair, injurious and unjust discriminations and deplorable conditions which the act was framed to prevent. If one exception may be made, although not provided for in the act, other exceptions may follow, until the act, so far as force and efficiency are

concerned, has become much impaired, and its application has been rendered very uncertain.

However, we have shown that, in the opinion of the Commission, it is not necessary to prove that the discrimination involved will injuriously affect the party or parties discriminated against, in order to establish a violation of section 2 of the act, and that appears to be the opinion also of this court.

In *Wight* v. *United States, supra*, the material facts were as follows: A Mr. Bruening was engaged as a wholesale dealer in beer, which he shipped by railroad from Cincinnati to Pittsburg, and his warehouse was located immediately adjacent to a sidetrack of the Pan Handle road at the latter point, while the warehouse of his competitor was not connected with any railroad. The competitor was also engaged at Pittsburg as a dealer in beer which was shipped to that point from Cincinnati. The beer might be shipped over either the line of the Pan Handle Company or that of the Baltimore & Ohio Company, but if Mr. Bruening shipped over the Pan Handle line the transportation rate paid by him would include delivery of the beer at his warehouse, while if he shipped over the B. & O. line he would have to incur the expense of carting his beer to his warehouse from the B. & O. depot, in Pittsburg, and such expense was found to be 3½ cents per 100 pounds. A similar expense for cartage in Pittsburg had to be paid by the competitor, regardless of the line over which his shipments of beer were transported, and the rate for

transportation by either of said lines was 15 cents per 100 pounds. Under these circumstances, and for the purpose of placing itself in a position where it could compete successfully with the Pan Handle Company and secure for transportation a portion of Mr. Bruening's shipments, the B. & O. Company paid to Mr. Bruening on his shipments 3½ cents per 100 pounds, but it did not make any similar payments on the shipments of said competitor, nor did it deliver such shipments at the warehouse of the competitor in Pittsburg.

In defending its action in the premises the B. & O. Company contended that if permitted to continue the discrimination it would derive benefit therefrom, while the discrimination would in no way injure said competitor, but this court held, as above shown, that the question of whether Section 2 of the act has been violated does not depend upon whether the discrimination involved is an injury to the party discriminated against. (Id. 518.)

This ruling was re-affirmed in the cases of *Int. Com. Com.* v. *Alabama Midland Ry. Co.* and *Int. Com. Com.* v. *D., L. & W. R. R. Co., supra*, and in the latter case this court showed that, in construing section 90 of the English act, which is in substance the same as section 2 of the act to regulate commerce, the English courts adopted many years ago, and have ever since followed, a similar ruling.

The decision in the Wight case was rendered on May 24, 1897, and, as is shown in said report (Rec.,

9–10, 13–14), the rule of law thus established has since been applied by the Commission in a great many instances.

III.

THE COURT ERRED IN SUBSTITUTING ITS OWN JUDGMENT FOR THE JUDGMENT OF THE COMMISSION CONCERNING THE CHARACTER OF THE TRAFFIC, TRANSPORTATION SERVICES, DISCRIMINATION, AND PREFERENCE AND PREJUDICE, INVOLVED.

Assignments 12 to 15, inclusive, challenge the right of the Commerce Court to substitute its own judgment for the judgment of the Commission concerning the facts found by the Commission, in determining the questions of whether the shipments compared are a like kind of traffic, whether the transportation services performed by the carriers are like and contemporaneous and performed under substantially similar circumstances and conditions, and whether the preference given by the carriers to shippers of railroad-fuel coal and the prejudice to which other shippers of coal are subjected by the carriers are undue.

In *Int. Com. Com.* v. *D., L. & W. R. R. Co., supra*, the matter involved was the right of carriers operating lines of railway in territory east of the Mississippi and north of the Ohio and Potomac Rivers, and known as Official Classification Territory, to restrict the application of their carload rates to cases where all the traffic in the car was owned by one party, and, where there was a diversity of ownership, exact rates which, in the aggregate, were much greater,

namely, the carriers' less-than-carload rates. The findings of fact made by a majority of the Commission, as stated by the court, were, in substance, as follows: (*a*) That a carrier could not properly look beyond goods tendered to it for transportation "to the ownership of the shipment," as the basis for determining the application of its established rates, because doing so would be a violation of the second section of the act to regulate commerce; (*b*) that the fact that the carriers in Official Classification Territory had voluntarily established both liberal carload rates and opportunities for combining various articles for the purpose of obtaining the carload rate gave the carriers no right to discriminate by depriving one person or class of persons of the right thus granted; (*c*) that a forwarding agent was equally entitled to the benefit of a carload rate when published and established, and that to deprive a forwarding agent of such rights would be a prohibited discrimination; (*d*) that, in any view, the restrictions formulated by the assailed rules were void because repugnant to the act to regulate commerce, since their enforcement as a matter of fact necessarily created preferences and engendered discriminations which the act forbade; (*e*) that this, among other reasons, was the case, because the enforcement of the assailed restrictions would not only create preferences in favor of one set of persons against another, but would create discriminations between places, and would be revolutionary in its operation upon interstate traffic; (*f*)

that irrespective of the abstract right of a carrier to make the ownership of goods offered for shipment a basis for applying its published rates, owing to the practical impossibility of a carrier being able to adequately enforce such a rule by determining who was the owner of the goods offered, such a rule as a matter of fact would, in and of itself, be an unlawful preference and discrimination forbidden by the act; and (*g*) that the same principle would control as to the attempt to establish a rule applicable alone to forwarding agents, because of the practical impossibility of distinguishing one class of agents from another. (Id. 248–249.)

Two members of the Commission dissented, and in a carefully prepared opinion written by Chairman Knapp, who is now presiding judge of the Commerce Court, made findings of fact and reported conclusions which were practically the opposite of those included in the report of the majority of the Commission.

An order in accordance with the views expressed in the majority report was entered by the Commission and served upon the carriers who were defendants in the proceedings before the Commission, but upon application to the Circuit Court for the Southern District of New York that court, after a hearing had, adopted the reasoning and conclusions expressed in the minority report and enjoined enforcement of the order; and from the decree of the Circuit Court an appeal was taken to this court.

Upon the issues thus formed this court held that the only matter presented which could properly be

reviewed in court was one issue of law, namely, the right of a carrier to make the ownership of goods the criterion by which its charge for carriage is to be measured. In this connection the court, speaking through Mr. Chief Justice White, said:

> As shown by the opinion of the Commission and that of the two members who dissented, there were many and wide differences in the views expressed. On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest upon but a single legal proposition: that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry; or, what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured. We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. * * * This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceed upon premises of

> fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court, because they were foreclosed by the opinion of the Commission. (Id. 251–252.)

To the same effect see: *Baltimore & O. R. Co.* v. *United States ex rel. Pitcairn*, 215 U. S. 481; *Southern Pacific Co.* v. *Int. Com. Com.*, 219 U. S. 433.

We respectfully submit that the rulings of this court in the above cases fully and completely support our contention that the Commerce Court erred in substituting its own judgment for the judgment of the Commission, as aforesaid.

It is true that in paragraph 10 of their bill the carriers stated that "the findings in the report of the Commission are findings of law as well in regard to violation of the third section of the act to regulate commerce as in regard to violation of the second section." (Rec., 6.)

But we have shown that, in its report, the Commission, after describing the circumstances and conditions pertaining to the transportation of railroad-fuel coal as compared with the transportation of other coal, and after calling attention to the language of section 2 of the act and pointing out that the difference in circumstances and conditions must be substantial in order to justify a disparity in rates, made statements as follows:

> The tariffs which contain rates applicable only to the shipments of certain consignees or when the commodity is put to a particular

> use and the rates which are so restricted to the use of certain shippers and not open to all shippers alike are in violation of section 2 of the act, and unjustly discriminatory in violation of section 3 of the act, and therefore unlawful. (Rec., 18.)

And in passing upon similar language of the Commission in the case of *Int. Com. Com.* v. *D., L. & W. R. R. Co., supra,* this court said:

> The finding of the Commission that to permit the enforcement of the rule would give rise to preferences and engender discriminations prohibited by the act to regulate commerce embodies a conclusion of fact beyond our competency to reexamine. (Id. 255.)

IV.

THE COURT ERRED IN ENTERING THE INTERLOCUTORY DECREE AND GRANTING THE TEMPORARY INJUNCTION, WITHOUT COMPLYING WITH THE REQUIREMENTS OF SECTION 3 OF THE COMMERCE COURT ACT OF JUNE 18, 1910.

The language of section 3 of the Commerce Court act of June 18, 1910, is as follows:

> That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the

operation of the Commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the Commerce Court other than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application.

And in section 2 of said Commerce Court act it is provided that:

An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restrain-

> ing the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree.

It is our contention that when the above provisions are read together it clearly appears that the Congress intended to make a distinction in procedure between ordinary suits in equity on the one hand and suits instituted to enjoin enforcement of an order of the Commission on the other hand, and provide that the Commerce Court shall not, by granting a temporary injunction, interfere with the work of the Commission, except where, in the opinion of the court, irreparable injury will otherwise ensue.

We also think it plain that the Congress intended to require the Commerce Court, in a case where it issues a temporary injunction, to state the reason or reasons upon which it bases its right to so interfere; that is, state the nature of the damage, and point to the evidence upon which it bases its opinion that irreparable damage will ensue if the temporary injunction is not issued.

The sections referred to are included in the same Act and were enacted into law at the same time. The court will therefore construe each in such a manner as to give force and effect, if possible, to the other. And we respectfully submit that a construction of section 3 contrary to that above indicated would render valueless the portion of section 2 which pertains to interlocutory orders and decrees.

Section 2 contains, in addition to the provision relating to appeals from interlocutory orders, a provision pertaining to appeals from final decrees; but it is apparent that the former provision is of much greater value than the latter to those interested in proper and effective regulation of transportation agencies.

If the Commerce Court may, simply as a matter of discretion, for its own convenience, the convenience of carriers, or some other similar reason, enjoin temporary enforcement of an order of the Commission, it may, we submit, destroy, for all practical purposes, the power of the Commission, and render impossible the regulation above mentioned: First, because transportation rates are so interwoven, and the practices of carriers in one locality so affect other localities and shippers therefrom and thereto, that one order made by the Commission and voluntarily obeyed by the carriers against whom the order is directed, although just and proper when made, may be rendered very unjust and improper by a decree of a court enjoining temporarily enforcement of an order contemporaneously or subsequently made; and second, because in section 15 of the act to regulate commerce it is provided that:

> All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years,

as shall be prescribed in the order of the Commission.

If the life of the Commission's order becomes extinct before the final decree of the court is made it is difficult to see wherein the power of the Commission to make the order is of any value. A second order could not be made until after a second investigation had been had, and, if made after such investigation, it would be subject to the discretion of the Commerce Court in the same manner and to the same extent as the first order had been.

In this case, not knowing what else to do, we have proceeded upon the assumption that the Commerce Court held against the Commission on every issue of law and of fact made by the pleadings of the parties, but such assumption may not be correct. Had the Commerce Court pointed out wherein it considered the order an abuse of, or in excess of, the power of the Commission, an appeal to this court might have been avoided. The Commission, by a modification of the order, might have been able to remove the legal defect pointed out by the Commerce Court; but, under present circumstances, there appears to be nothing for this court to do, except to examine the entire record and determine whether the matters included therein justify the action taken by the Commerce Court.

A construction of the law which makes necessary such a method of procedure does not appear to us to be reasonable; because it indicates that the Congress

attempted to do something which is in excess of its power under the Constitution; that is, confer upon this court original jurisdiction in the premises.

In the case of *Baltimore & Ohio Railroad Company* v. *Interstate Commerce Commission*, 215 U. S. 216, the matter under consideration was an order of the Circuit Court for the District of Maryland. In substance the order was, "that this case be certified for review to the Supreme Court of the United States," and that "a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States; and the same is transmitted accordingly." And in that connection this court said:

> The act of Congress of February 11, 1903, provided in its first section that, on the certificate of the Attorney General, the case should be assigned for hearing before not less than three judges, and that, "in the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal, as hereinafter provided." The order of the Circuit Court pursues the language of this provision and attempts to send up the whole case to be determined by this court. This invokes the exercise of original jurisdiction and cannot be sustained. (Id. 223–224.)

To the same effect see: *Southern Pacific Company et al.* v. *Interstate Commerce Commission*, 215 U. S. 226.

We are confident that this court will not construe

the Commerce Court act, either so as to cause the provisions of section 3 to nullify an important and essential provision of section 2, or in such a manner as to establish that, in framing the act, the Congress exceeded the powers conferred upon it by the Constitution.

We therefore submit that the Commerce Court erred in granting the temporary injunction, without expressing the opinion that irreparable damage would ensue if the injunction were not issued and pointing to the evidence upon which it based such opinion.

If, however, this court be of opinion that the discretion referred to exists, then we insist that, for reasons hereinbefore given in detail, a determination of the questions presented to the Commerce Court did not call for, or justify, the exercise of judicial discretion; and of course it cannot be successfully contended that the Congress either intended to, or that it could, confer upon the Commerce Court, or any other court, discretion legislative in character.

In the case of *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S., 452, this court, speaking through the present Chief Justice, in prescribing the rules to be followed by Federal courts, where called upon to suspend or set aside an order of the Commission, said:

> Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (*a*) all relevant questions of constitutional power or right; (*b*) all pertinent ques-

> tions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. * * * Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.
>
> Power to make the order, and not the mere expediency or wisdom of having made it, is the question. (Id. 470.)

We respectfully submit that every question which was submitted to the Commerce Court for determination in this case is included in the exclusive jurisdiction of the Commission, as above defined.

We therefore ask this court to reverse the decree of the Commerce Court, and remand the case to that court, with instructions to dismiss the bill.

Respectfully submitted.

P. J. FARRELL,

Solicitor for Interstate Commerce Commission,
Appellant.

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JAMES H. McKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 719.

THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES,

Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY,

ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR APPELLEES.

W. IRVINE CROSS,
H. L. BOND, JR.,

Solicitors for Appellees.

J. H. Furst Company, Printers and Publishers, Baltimore, Md.

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BRIEF FOR APPELLEES.

STATEMENT OF CASE.

In the year 1910 the Interstate Commerce Commission instituted of its own motion an investigation of the practice of the railroads filing tariffs in which the traffic in railroad fuel coal was treated as a different kind of traffic from the traffic in commercial coal between the same points. The report of the Commission, on page 8 of the Record, says:

> "In the territory east of Illinois and north of the Ohio River carriers quite generally have followed the practice of filing and using tariffs which named rates

> for the transportation of coal when for railroad use lower than the rates applicable to the transportation of commercial coal between the same points. The underlying question has been before the Commission in various forms many times and this proceeding was instituted by the Commission for the purpose of considering it at this time and in a formal way."

The traffic in railroad fuel coal has always been treated as a kind of traffic unlike the traffic in commercial coal between the same points, and not subject to the same transportation charge. In the system of tariffs investigated by the Commission, it has been the practice of the railroads to treat the traffic in railroad fuel coal as a separate kind of traffic from that in commercial coal. The fuel coal is consigned to a junction of the consuming road, and the separate nature of the traffic is described by using the words "for the use of that railroad."

In the report of the Commission (on page 16) its position is thus stated:

> "We have never held that the local rate to the junction point must be paid on shipments going beyond that point. What we have said is that the local rate to the junction point shall be the same to all shippers to that point, and that the through charge on shipments going beyond the junction point shall be alike for all shippers to the same destination."

The Commission has supplemented this by its Conference Ruling No. 324, published June 19, 1911:

> "DIVISIONS ON COMPANY COAL.—Upon inquiry, Held, That it is unlawful for carriers to make special and discriminatory divisions of joint rates upon locomotive fuel as between an originating or participating carrier and a purchasing carrier. In the division of

joint rates a railroad must be treated precisely as any other shipper is treated, and the Commission will regard any special division as a device to defeat the published rate. All divisions upon fuel coal must be made in good faith without respect to the fact that one of the carriers is the purchaser of such coal."

The system that the Commission's order proposes to substitute for the present is set forth in the Commission's report page 13:

> "The objections from a practical standpoint to departing from the present system do not present any grave problems or any difficulties that can not easily be overcome. A carrier has an unquestioned right to haul its own property or its own rails at will. A joint rate between the producing road and the consuming road, applying to a given point on the line of the consuming road, and out of which the producing road gets a division that is the same as its present fuel rate, would yield the same results that are yielded by the present system."

The purpose of the Commission's order was therefore to forbid the filing of tariffs in which the traffic in railroad fuel coal was treated as a separate traffic from the traffic in commercial coal, and to require that it move under precisely the same published tariffs as the commercial coal.

The Commission's order is on page 27 of the Record, and is as follows:

> "It is ordered, That the above-named respondents and interveners be, and they are hereby, directed, on or before the 15th day of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from

their present practice of maintaining and using tariffs on coal the rates in which are restricted to shipments of or for certain consignors or consignees, or when the coal transported is for a particular use.

"It is further ordered, That said respondents and interveners be, and they are hereby, directed, on or before said 15th day of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from maintaining any rates on coal which are applicable only to the shipments of certain consignors or consignees, or when the coal transported is put to a designated use, and which rates are not open alike for all shippers."

The question before the United States Commerce Court when it issued the preliminary injunction in this case was whether or not Section 2 of the Act to Regulate Commerce required that the two forms of traffic should be treated as like.

On May 29th, 1911, the United States Commerce Court, on petition of these appellees, passed an order suspending and enjoining the Commission's order until the further order of the Court (page 46).

On June 6th, 1911 (page 53), an appeal to this Court from that order was allowed the Interstate Commerce Commission and on June 16th, 1911 (page 58), a similar appeal was allowed to the United States of America. It is upon this appeal from the order granting the preliminary injunction that this case comes up.

Practical Results of the Two Systems.

System under Commission's Order.

We will adopt Commissioner Prouty's language on page 19 (near the bottom of the page):

"To this system, in practical operation, the defendants urge several objections;

"1. The railroad generally buys its fuel f. o. b. the mine. The rate which it pays from the mine to the junction point is the division of the joint rate. That division is a matter of contract between the two roads. It is not published and is not, therefore, necessarily known. It may be changed from day to day without notice to anyone. Coal operators who desire to sell for fuel supply complain that under this system they do not know, and can not know, what the rate is, nor whether that rate will be maintained, nor, if the rate is an unfair one, can they apply to this Commission for its correction. It is further urged that there frequently has been and that there always will be more or less manipulation in these divisions, with the result that certain mines or certain lines of railway will be preferred.

"The answer of the Commission to this objection is that it may require from the carrier a statement of its division. We may undoubtedly require carriers to inform us of their divisions and to state from time to time any changes in those divisions, but the divisions themselves are not a part of the rate which carriers are required to publish. If they were published there is no requirement which will prevent their change at the will of the carrier. This Commission has no jurisdiction to fix these divisions except in case of a joint rate established by it where the carriers have failed to agree between themselves upon the division.

"It seems clear to me that under the system which the Commission says must be followed the actual rate upon which this traffic moves never can be known; that this rate may be changed from day to day, and that it is entirely beyond the power of the Commission to correct it, if wrong. All this follows, of necessity, from the fact that whatever the theory of the case may be, in actual practice the rate upon which this traffic moves is the division of the producing carrier up to the junction point."

2. The second bad result of the system comes from the fact that while it takes into account a competition of the railroad fuel coal with the commercial coal (which is purely imaginary) it ignores the actual competition of those bidding for a railroad's fuel supply with other mines in the same group, and with coal from other fields reaching the consuming railroad at other points on its line. We will again quote from Commissioner Prouty's opinion, at page 20 (the diagram used by Commissioner Prouty and necessary to the understanding of his opinion has been omitted from the Record, and we have therefore printed the opinion with the diagram as an Appendix to this brief).

> "2. Assuming that there were any method by which this division could be made public, by which its observance could be secured, and by which it could, if unjust, be corrected, there are still serious objections to that system, which will be best shown by reference to the following diagram:

"AB is the consuming road and D the point of consumption. BC is the producing road. Y and Z

are mines upon the extreme limits of a group. It is 100 miles from D to B, 50 miles from B to Y, and 25 miles from Y to Z.

"As is almost universally the case with coal tariffs, there is a group rate from Y-Z to D, which in this case is $2 per ton, and this rate is divided between the railroads AB and BC upon a mileage basis. Upon each ton of coal originating at Y, AB would receive $1.33⅓ and BC 66⅔ cents, while upon a ton of coal originating at Z, AB would receive $1.14 2/7 and BC 85 5/7 cents. If, therefore, AB buys its fuel coal of the mine Y it pays for its transportation to B 66⅔ cents per ton, while if it buys its fuel coal at Z it pays for its transportation to B 85 5/7 cents per ton. Consequently, AB obtains its coal 19 cents per ton cheaper if it pays the same price to the mine at Y as it pays at Z. Since this is a very handsome profit in the mining of coal it is evident that Z can not compete with Y for the fuel supply of AB.

"Now, what these carriers desire to do is to make a group rate from Y to Z, somewhat greater than 66⅔ cents, and somewhat less than 85 5/7 cents, which will put the entire group upon the same competitive basis with respect to the fuel supply of the road AB which that group occupies with respect to private consumption at point D.

"If, now, we add another producing railroad, AE, and consider shipments from mine O as compared with shipments from mine Y, we have another situation. The distance from D to A is 50 miles and from A to O 100 miles. From O to D the distance is therefore the same as from Y to D, and the rate from these two mines to D for private consumption is also the same. Out of a rate of $1.50 per ton the road AB obtains $1 when the coal originates at Y and 50 cents when it originates at O; that is, if it purchases its fuel at Y it

would pay 50 cents per ton for delivery upon its rails, while if it purchased at O it must pay $1 for that service. While AB will pay something more for its coal at A than at B, since its own haul from B is somewhat greater, still there would be nothing like the difference expressed in the difference of these divisions, and what the railroads desire in this case is to make such a rate from O to A, in comparison with the rate from Y to B, as will give the mine O the same opportunity to compete for the fuel supply of AB which they enjoy in competing for private supply at point D.

"The figures above given are extreme, but the situation illustrated runs all through these coal regions and is of vast importance. Some producing coal roads handle nearly or quite one-half the entire output of their mines for railroad fuel supply. In case of many mines more than one-half the output goes to that purpose, and whether a mine shall exist is often determined by whether it can furnish railroad fuel."

System Adopted by Railroads.

The objects to be secured by a proper system of rates on railroad fuel coal were that the rates filed on railroad fuel coal should be public, fixed and subject to the control of the Commission: that they should represent the actual cost of the transportation to the consuming road: that they should take into account not the competition of the commercial coal at the point of delivery, which was an imaginary competition, but the actual competition of other coal fields reaching the consuming railroad at other points, and should in other respects be based upon and fixed by the actual circumstances and conditions of the railroad fuel traffic.

These objects are obtained by the present method. Rates on railroad fuel coal are published not to the points of consumption on the consuming railroads, but to the junction points

of the consuming railroads where the delivery is actually made. In this way the actual transportation cost to the consuming railroad is published and subject to the control of the Commission. The amount of the rate is fixed not by any reference to the rate on commercial coal to the same point, with which the fuel coal is not in competition, but by a consideration of the circumstances and conditions that affect the railroad fuel traffic itself. The rate on the railroad fuel coal to the junction point would generally be lower than the rate on commercial coal to the same point, for the following reasons:

1. The service performed by the carrier is not the same. The cars of commercial coal are shifted, separated and delivered on delivery tracks provided for that purpose, and the shipper given a certain time, usually 48 hours, sometimes more, in which to unload the car. The cars of fuel coal would simply be placed on the exchange track of the consuming railroad, and the responsibility of the delivering carrier for the car ends at once.

2. The service is different also in the fact that the commercial coal is delivered where it is to be used, while the fuel coal still has to be hauled by the consuming road to the points of consumption, the railroad fuel traffic bearing in this respect a close analogy to export traffic.

3. The shipper of fuel coal is in competition with other coals upon the line of the consuming road, with which the commercial coal is not in competition. Unless he can meet the prices upon these he can not sell to the railroad at all.

It is not denied that the system thus established has worked well. Commissioner Prouty says (page 21 at middle),

> "The system which the railroads now have in effect was first established at the request of the operators, but is now approved by all parties concerned, the operators, the producign road, and the consuming road. It is universally recognized that in no other way can the ac-

tual rate of transportation be known. In no other way can its maintenance be assured and in no other way could it, if wrong, be corrected by public authority."

There is no suggestion to the contrary in the opinion of the Commission. The very careful opinion of Commissioner Clark on the contrary devotes much time to suggesting a way in which the railroads may avoid the bad results of the Commission's order and secure the good results of the present system.

POINT I.

THE FILING OF TARIFFS IN WHICH THE TRAFFIC IN RAILROAD FUEL COAL IS TREATED AS A SEPARATE TRAFFIC FROM THE TRAFFIC IN COMMERCIAL COAL BETWEEN THE SAME POINTS IS NOT A VIOLATION OF SECTION 2 OF THE ACT TO REGULATE COMMERCE.

The system of railroad fuel rates now established by the carriers, was adopted by them at the suggestion of the coal operators, and has worked to the advantage alike of operators, consumers, railroads and dealers in commercial coal. It is not questioned by the Commission that there is no competition between the railroad fuel coal and the commercial coal. Neither is it questioned that the fuel coal is to be transported under a lower transportation charge than that to be borne by commercial coal. The position taken by the Commission is that the features of this traffic which require that it move under a lower transportation charge cannot be treated as the "circumstances and conditions" referred to in Section 2 of the Act to Regulate Commerce, if the special traffic is differentiated in the several tariffs by referring to the consuming railroads at whose junctions it is delivered, and on whose lines it is to be used. Section 2 of the Act to Regulate Commerce is as follows:

> "SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

When the railroad fuel coal is consigned to the junction point, as provided by the present system of tariffs, the circumstances and conditions that differentiated this traffic from the traffic in commercial coal consigned to the same point are:

1. The fuel coal so shipped is not in competition with the commercial coal consigned to the same point.

2. It is in competition with other coals coming upon the line of the consuming road at other points, with which the commercial coal is not in competition.

3. The transportation service is different, in that commercial coal at the junction point has reached the point of use, while railroad fuel coal reaching the consuming railroad at the junction point is still subject to a transportation service before reaching the point of use,—a transportation under the "Commodities Clause" and not under tariff.

The question then raised by the Commission's order is this:

> "Is it lawful to make a rate to the junction point on fuel coal different from that on commercial coal, it

> being admitted that the fuel coal is not in competition with the commercial coal, that it is in competition with coals with which the commercial coal is not in competition, and that the rate will carry the commercial coal to the point of consumption and will not so carry the fuel coal?"

The effect of the Court's order and Report is:

> "Do not publish any rate to the point where the fuel coal is actually delivered.
>
> "Name a delivery point where the coal is not really delivered.
>
> "Publish a joint rate to that point that is not a real rate.
>
> "You can, if you choose, call your present rate to the actual point of delivery a division, and make a voluntary publication of it."

By this complex and roundabout method we maintain an apparent identity of rates upon two unlike forms of traffic, but secure the real difference in rates which the unlikeness of the two forms of traffic requires, by calling one a rate and one a division.

It is significant that the Commission's Report, while finding that the railroad fuel traffic is a like kind of traffic under Section 2 with the traffic in commercial coal, does not discuss at all the bearing on this question of the two most important features of the railroad fuel traffic—the two features which we think in themselves make it an unlike traffic to that in commercial coal, viz.: that it does not come into competition with the commercial coal and is in competition with coals coming on the railroad's line at other points.

Section 2 of the Act makes it unlawful by any device to charge a greater or less compensation "in the transportation of a like kind of traffic under substantially similar circum-

stances and conditions." The Commission's Report says that to openly charge a lower rate for the fuel coal from the point of shipment to the junction point comes within the prohibition and is unlawful. It then proceeds to furnish us with a device that will, to use its language, "*yield the same results that are yielded by the present system*"—in other words enable us to charge a lower rate for the fuel coal than for the commercial coal between the same points.

We deliver the fuel coal to the consuming road at the junction point at a different rate from that paid by the commercial coal to the same point. We have only to publish a nominal delivery point beyond the real delivery point, publish a rate to that point that we do not intend to charge and call our actual rate to the junction point, based on the special circumstances and conditions, a "division." The suggestion strikingly illustrates how readily the Commission's order lends itself to manipulation of rates. If, under it, the Commission can so easily juggle a rate for a good purpose, will not ingenious traffic agents and coal operators do the same for their own perverse ends? The device with which Commissioner Clark hopes to get rid of the effects of the Commission's order strikingly illustrates also the force of Commissioner Prouty's statement in regard to the present system (page 21 of Record):

> "It is universally recognized that in no other way can the actual rate of transportation be known. In no other way can its maintenance be assured, and in no other way could it, if wrong, be corrected by public authority."

But what is the legal necessity for all this legerdemain? Why may we not do openly what we do by indirection, viz., publish the actual rate to the actual point of delivery (the junction point), fixing the rate by the "circumstances and conditions" that govern this traffic? Why keep up the legal fiction of identity of two forms of traffic, that we intend

to treat as unlike? It is a question of words. A question of the nomenclature to be used in tariffs. The commercial coal is delivered at a certain railroad junction point, and the railroad's fuel coal is also delivered there. The commercial coal has reached its point of use. The fuel coal can only be used after further transportation. The rate that will move the commercial coal would not move the railroad fuel coal, because it is subject to a competition that the commercial coal is not. Between the two coals there is no competition or interest in one another's rates. There is every reason why the fuel coal should bear a different transportation charge to that point of delivery. So far, the Commission is in full accord with us. It admits that the traffic should go under a different transportation charge. It forbids us, however, to file that transportation charge as a rate to that point of delivery, because we would have to describe the fuel coal as "railroad fuel coal to be used on a certain railroad." This, it says, makes it a rate "restricted to certain consignors or consignees," or "restricted to shipments . . . . when the coal transported is for a particular use." The railroads have used to describe a commodity that is carried by a railroad without any tariff rate, precisely the language that has been used by Congress in the "commodities clause" to describe the only commodities that can legally be so carried. The language of the "commodities clause" is:

> "such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

When Congress in the commodities clause wished to describe the only commodities that could be transported by a railroad without any tariff at all, it described them, identified them, by the very language that the railroads have employed to identify the commodity carried in this traffic.

When the railroads want to describe such coal as may under

the commodities clause be transported by the receiving railroad without any tariff rate, why may they not use the same language that Congress has used?

Is not this suggestion of a rate "restricted to certain consignors" somewhat artificial? No one will claim that a special rate can be given to a particular consignee based simply on his personality, but a consignee may receive a special rate on a special kind of traffic. Neither can a special rate be given because of the use to which a commodity is to be put. But it would be a strange principle that a rate could not be influenced by the place where the commodity was to be used, or the transportation it must still undergo in reaching the point of use. A railroad (as distinguished from a railroad company) is not a person. It is, rather in the nature of a geographical division, and extends through long distances. A railroad's use of coal for fuel is not different from the use of it by any other consumer of fuel. The service in delivering it at the junction point differs in the fact that the coal still has to be transported through long distances to secure its use at all.

There is no more reason why the line of a railroad should not be used to point out the place where or within which a commodity is to be used than that a river, a county or a city should not be so used. When a tariff uses the expression "railroad fuel coal delivered at junction of the A. B. Railroad for use on that railroad," that marks off, as clearly as language can, a coal, delivered at that junction point subject to transportation along that railroad under the "Commodities Clause" and that is in competition with other coals coming on that railroad at distant points. It is hard to see how coal delivered to a railroad at a junction point, subject to a further transportation to the point of use, differs in principle from a commodity delivered at a seaport but subject to a further transportation out of the country. On this subject Commissioner Clark uses this language (page 15):

> "It is suggested that these special fuel rates are analogous to export and import rates, and the Pitts-

> burgh Glass case, 13 I. C. C. Rep. 87 and the Import Rate case, 162 U. S., 197, are cited in that connection. We are not prepared to admit that analogy, but even if it does exist, the export and import rates are open and available alike for all shippers, while the rates here considered are restricted in their use to certain shippers, or are conditions upon the commodities being put to a certain use."

This distinction is not real. The railroad fuel rates are "open and available alike for all shippers," that is, for all shippers wishing to engage in the special traffic on which the rates are made. They are not restricted to certain shippers. They are not "conditioned upon the commodities being put to a certain use." They are limited to a service where the commodity is subject to further transportation under the "Commodities Clause," before reaching the point of use. We claim that the analogy in principle of the railroad fuel traffic to the import traffic and the export traffic is complete.

The Commission decides that the facts regarding the railroad fuel traffic that justify the allowing to it a different transportation charge by indirection, cannot be considered by them as the circumstances and conditions that under section 2 justify a different rate: that they can not be considered by them under that section as constituting an unlikeness in the kind of traffic or an unlikeness in the service rendered.

The question came up before the Commission in the Import Rate case (162 U. S., 197) whether or not under section 2 the Commission could consider ocean competition and circumstances and conditions that exist beyond the seaboard of the United States as justifying a difference in rates between import and domestic traffic. The Commission held that it could not. This court held that it could. The Commission in the Pittsburgh Plate Glas case (13 I. C. C. Rep. 87) followed this, and in Kemble *vs.* B. & A. R. R. Co., (8 I. C. C. Rep. 118) applied the same principle to shipments for export. The features

that were allowed to differentiate export and import traffic from domestic traffic between the same points were these:

1. That while the cost to the carrier of the transportation service between the same points was the same, the value of the transportation service in the Import and Export Traffic to the shipper was less than in the domestic traffic.

2. That the import and export traffics were subject to competition with transportation routes not under control of the Commission.

Both of these were circumstances and conditions not taking place during the carriage under the rate.

The position taken by the Commission in the import rate case, quoted in 162 U. S., 207-208, was as follows:

> "The statute has provided for the regulation of interstate traffic by interstate carriers, partly by rail and partly by water, or all rail, shipped from one point in the United States to another destination within the United States, or from a point of shipment in the United States to a port of entry within the United States or an adjacent foreign country, or from a port of entry either within the United States or in an adjacent foreign country, on import traffic brought to such port of entry from a foreign port of shipment and destined to a place within the United States. In providing for this regulation the statute has also provided for the methods of such regulation by publication of tariffs of rates and charges at points where the freight is received and at which it is delivered, and also for taking into consideration the circumstances and conditions surrounding the transportation of the property. The statute has undertaken no such regulation from foreign ports of shipment to ports of entry either within the United States or to ports of entry in an adjacent foreign country, and as between these ports has provided for no publication of tariffs of rates and charges, but has left it to the unre-

> strained competition of ocean carriers and all the circumstances and conditions surrounding it. The circumstances and conditions are indeed widely different in many respects from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the States of the American Union by rail carriers; but as the regulation provided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons in themselves why imported freight brought to a port of entry of the United States or a port of entry of an adjacent foreign country destined to a place within the United States should be carried at a lower rate than domestic traffic from such ports of entry respectively to the places of destination in the United States over the same line and in the same direction."

This was a decision that the most important features of a tariff, those that conditioned it and gave it its entire character would, under section 2, be ignored by the Commission unless they were under the Commission's control.

This court substituted for this a construction making it the right and duty of the Commission under section 2 to deal with the real nature of the tariffs and the actual circumstances and conditions that gave it its character, and not with a selected part of its features. The Commission there, as in the present case, was stripping itself of the powers necessary to the proper performance of its duties.

On page 217 the Court said:

> "The Commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the Commission to consider the 'circumstances and conditions' attendant upon the foreign traffic as such 'circumstances and conditions' as they are directed in the act to consider. The Com-

mission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its pro rata share of such rates, was an act of 'unjust discrimination,' within the meaning of the act.

"In so construing the act we think the Commission erred."

Again, on page 219, the ~~Commission~~ Court said:

"The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were 'like,' whether the transportation was effected under 'substantially similar circumstances and conditions.' To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or not 'unjust.'"

In the present case there is, as in the import case, a movement of the railroad fuel coal after reaching the point of delivery at the junction, before it reaches the points of use. It is not under control of the Commission but it makes the carriage to the junction a distinctly different transportation service from that which brings the commercial coal to the same

point. There is a competition between the fuel coal and coals reaching the railroad line at other points, to which the commercial coal is not subject, just as the import traffic was subject to a competition with other lines to which the domestic traffic was not subject. These are not only actual and potent circumstances and conditions that "would be regarded by carriers apart from the operations of the statute as 'matters which warrant differences in charges,' but the necessity of so treating them is actually recognized by the Commission itself. Without these differences the fuel traffic will not move. They are precisely the differentiating features that are meant to be considered under section 2 of the act.

POINT II.

The Commission's method of filing fuel coal rates is illegal under Section 6 of the Interstate Commerce Act and under the Elkins Act.

Section 6 of the Interstate Commerce Act prescribes the method of filing rates, and uses this language:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The

schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Subsequently, in the same section, there is this language:

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

And again:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connec-

> tion therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

In the Elkins Act, in its first section (near the beginning thereof), there is this provision:

> "and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."

The method of filing tariffs on the railroad fuel coal now practiced by the railroad conforms strictly to these provisions in spirit and in letter. The method prescribed by the Commission's order is an open violation of both. The provision that "No carrier shall . . . . engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with this Act," is treated as a dead letter, so far as the railroad fuel coal is concerned. The railroads are instructed to file tariffs in which the published rates are not the

rates upon which that coal is transported. They are even instructed to publish an inconvenient destination and engage in a needless haul in order that there may be a part of the published rate that is not really paid. In order to conform to the law, even if the point of delivery be made as required by the Commission, the tariffs would have to set forth the points between which the fuel coal and the commercial coal were transported and the exact rate under which each of them was transported. The tariff would have to show on its face that between the same points the rate under which the fuel coal was transported was different from that under which the commercial coal was transported. It all goes back to the same principle that we have dwelt on under Point I. The traffic in fuel coal involves a transportation of the fuel coal for a part of its route without paying any transportation charge. This makes the transportation of it an unlike kind of traffic from that in commercial coal, and we can not legally avoid the effect of section 2 by a violation of section 6. Congress never intended that the tariffs prescribed in section 6 should cover the transportation of the carrier's own property.

POINT III.

THE UNITED STATES COMMERCE COURT HAD POWER TO REVIEW ON APPEAL THE CONSTRUCTION PUT BY THE COMMISSION ON THE ACT TO REGULATE COMMERCE EVEN THOUGH THE SUBJECT-MATTER OF THE ORDER WAS WITHIN THE JURISDICTION OF THE COMMISSION AND THE ORDER DID NOT VIOLATE ANY CONSTITUTIONAL RIGHT.

This question is raised by the Interstate Commerce Commission in its second assignment of error, page 50. The assignments of error by the Interstate Commerce Commission from the 3rd to the 15th, inclusive, while purporting to set forth matters decided by the Commerce Court, do not, we think,

clearly and fairly state the question that was before that court for decision, as will appear from an examination of the Commission's order and its report. The persistent suggestion that the fuel coal rates are based upon the personality of the shipper and the use of the coal, the persistent ignoring of the features that differentiate the fuel coal traffic, make it necessary that we state the actual law questions that were before the Commerce Court in considering the Commission's order. The first law question involved was as follows: "Is the filing of tariffs in which the traffic in Railroad Fuel Coal is treated as an unlike traffic to the traffic in commercial coal between the same points a violation of section 2 of the Act to Regulate Commerce?" A second law question was: "Has the Commission power, under section 6 of the Act to Regulate Commerce, to order the filing by the railroads of tariffs under which the carrier is to receive a different compensation for the transportation of railroad fuel coal between the points named in such tariffs than the rates and charges which are specified in the tariffs filed and in effect at the time?"

The theory that the Commission can, by an interpretation of the law that created it, strip itself of a part of its powers and duties, and that in so construing the law its action should not be subject to appeal, would seem to be a proposition not requiring more than the statement of it. In the Import Rate case, 162 U. S., 197, a question was involved very similar to that which is raised in this case, to wit.: whether or not import traffic constitutes a like kind of traffic with domestic traffic between the same points. The Commission held that certain essential features of the import traffic were not circumstances and conditions that it could consider under section 2 of the Interstate Commerce Act. The court says, on page 217:

> "The Commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the Commission to consider the 'circumstances and conditions' attendant upon the foreign

traffic as such 'circumstances and conditions' as they are directed in the act to consider. The Commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its pro rata share of such rates, was an act of 'unjust discrimination' within the meaning of the act."

"In so construing the act we think the Commission erred."

On page 210, the court, after quoting the Commission's own language, says:

"It is obvious, therefore, that the Commission in formulating the order of January 29, 1894, acted upon the view of the meaning of the statute which is expressed in the foregoing passage. We have, therefore, to deal only with a question of law, and that is, what is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce. If the construction put upon the act by the Commission was right, then the order was lawful; otherwise it was not."

In the case of Louisville etc. R. R. Company *vs.* Behlmer, 175 U. S. 648, the question was whether or not the Interstate Commerce Commission could legally ignore certain circumstances and conditions as being circumstances and conditions that should have been considered by them under the fourth section of the act, the long and short haul clause. This court, on page 654, used the following language:

"This determination of the Commission to restrict its examination of the evidence solely to the extent ne-

cessary to enable it to ascertain the source and inherent character and not the materiality and substantiality of the competition, and therefore to exclude wholly from view the latter considerations, was predicated on the conclusion that, as a matter of law, no competition, however great might be its influence on carriage and rate making, could be by the carrier taken into consideration, of his own motion, in determining whether a lesser sum would be charged for the longer than for the shorter haul, if such competition arose from the sources or was wholly of the character which it was found by the Commission the proof established the competition relied on to be. That is to say, the Commission concluded, as a matter of law, that it was unnecessary to weigh the facts for the purpose of determining the materiality and extent of the competition, because, however strongly the proof might demonstrate its potency upon traffic and rates, nevertheless it would be without efficacy to give rise to such substantial dissimilarity as would justify the carrier, of his own motion, to charge a lesser rate for the longer than for the shorter haul."

And again, on pages 672-673, the court spoke as follows:

"The Commission and the Circuit Court of Appeals, it is asserted, although they may have expressed erroneous opinions as to the construction of the statute, yet, ultimately, in substance, decided, as a matter of fact, that the competition was not of sufficient weight to bring about dissimilarity of circumstances and conditions. But this suggestion is without merit. We have shown, in our previous analysis of the action of the Commission and of the views expressed by the Circuit Court of Appeals, that whilst the facts were considered in so far as was necessary to determine that the competition was due only to certain particular causes, the result of

the competition was not examined in order to ascertain the substantial materiality of its operation on traffic and rates. And this, because both the Commission and the Circuit Court of Appeals determined that competition of the particular character which they found that relied on to be, as a matter of law, however weighty in its operation on rates, was not legally entitled to be considered in reviewing the action of the carrier.

"This failure to consider the evidence points to the distinction between this cause and that of Cin., N. O. & Texas Pacific Railway *vs.* Interstate Commerce Commission, 162 U. S. 184, upon which reliance is placed. In that case the court, from an examination of the whole record, considered that the result of the action of the Commission and the Circuit Court of Appeals had been substantially to decide not that the character of competition relied on could not be taken into view, but that fully weighing and considering it, sufficient proof did not result to show that it was so substantial and so material as to justify deciding that there were dissimilar circumstances and conditions."

In the case of East Tennessee etc. Ry. Company vs. Interstate Commerce Commission, 181 U. S. page 1, the question was as to what "circumstances and conditions" would be considered by the Commission as giving the right under section 4 of the Interstate Commerce Law to charge more for a short than for a long haul. The Commission held that however controlling competition might be on rates to any given point, if it arose from the action of one or more carriers who were subject to the act to regulate commerce, dissimilarity of circumstances and conditions provided in the 4th section could not be produced by such competition unless previous assent of the Commission was given to the taking by the carrier of such competition into view in fixing the rates to the competitive points. This court said, on page 12,

> " But since the ruling of the Commission was made in this case, it has been settled by this court that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point. That is to say, that the dissimilarity of circumstance and condition pointed out by the statute which relieves from the long and short haul clause arises from the command of the statute and not from the assent of the commission; the law, and not the discretion of the commission, determining the rights of the parties. It follows that the construction affixed by the commission to the statute upon which its entire action was predicated was wrong."

In the case of Southern Ry. Company vs. St. Louis Hay & Grain Company, 214 U. S. 297, the Interstate Commerce Commission held that where the railway company performed for a hay company certain services in the reconsignment of its hay which the shipper could not demand from it but which the carrier could lawfully render, the railway company could only charge what amounted to the actual cost to it of rendering the service. This court held that the Commission was wrong and that the carrier was entitled to receive some compensation beyond the mere cost of rendering the service.

In the case of Interstate Commerce Commission vs. Northern Pacific Ry. Company, 216 U. S. at page 538, the Commission, acting under the power given them in the Hepburn Act to establish through routes and joint rates " where no reasonable or satisfactory through route exists," passed on order upon its own motion requiring the establishment of a certain through route and the rates upon it. On a proceeding to enjoin the enforcement of the order it was contended that the question of whether or not the through route already in existence was reasonable or satisfactory rested with the Commission. The facts relating to

the existence and character of the through route already in existence were practically undisputed. This court held that it had power to inquire whether or not it was or was not a reasonable or satisfactory through route in the sense of the statute. It decided that there was no case for the action of the Commission, using this language:

> "But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for the view of the law upon which this Court must pass."

In the case of Interstate Commerce Commission vs. Delaware Lackawanna & Western Ry. Company, 216 U. S. 531, the Interstate Commerce Commission, at the instance of a railway, passed an order to compel the D. L. & W. Ry. Company to furnish it a switch connection. The right exercised by the Commission of giving a switch connection was, in the Act, described as the power to compel "switch connections with lateral roads" and only "at the instance of shippers." The application in this case was not at the instance of a shipper, and this Court held that the Commission erred in passing the order.

In Interstate Commerce Commission vs. D. L. & W. R. R. Co., 220 U. S., 235, the Commission passed an order requiring carriers to remove from their tariffs a provision which prohibited forwarding agents from obtaining the benefit of the carload rates. This court held that the ruling of the Commission involved a question of law, viz., the right of the carrier to make the ownership of goods the criterion by which the charge for carriage is to be measured. This court decided against this right and affirmed the construction of the law taken by the Commission, refusing to go into the Commission's finding of fact.

In all of these cases the subject matter of the order was

within the jurisdiction of the Commission. There was no question involved of its violation of any constitutional right, but the court treated the action of the Commission in each case as involving a question of law and reviewed the decision of the Commission thereon.

In the present case the question whether or not the Commission can refuse to consider the features of the fuel traffic, as making it an unlike traffic with the traffic in commercial coal, is a pure question of law, difficult to distinguish in principle from that which was decided in the Import Rate case.

The fact at the root of the whole matter is the fact that the railroad fuel coal on the line of the consuming road does not pay tariff rates because the charge goes to the carrier owning the coal. This fact is undisputed and indisputable. From this fact flow the consequences so clearly explained by Commissioner Prouty. These consequences are not and can not be denied. That there can be no competition between the railroad fuel coal and commercial coal results from the same fact. The Court need not be told that coal paying tariff rates cannot compete with coal that pays nothing. The effect of these consequences from the one fact is that the railroad fuel coal market is commercially a distinct market to itself. As explained by Commissioner Prouty the through rates published on commercial coal, if attempted to be applied to coal going into the railroad fuel market, will not fit, and will produce inequalities and impossibilities with respect to shippers to whom the same rates give equality and access to market for commercial coal.

The appellees contend that the undisputed facts above stated distinguish the traffic in railroad fuel coal from the traffic in commercial coal within the meaning of the term "traffic" in the second section of the Act, and that the service performed in transporting coal destined for the railroad fuel market is not a like service to that performed in transporting coal destined for the commercial market. The values of the services are commercially different and determined by different factors.

POINTS IN APPELLANTS' BRIEF.

For the most part, the points raised in appellant's brief have been covered in previous argument. In its second point on page 22 and 23, appellant's brief states that the circumstances and conditions referred to by appellee may be summarized under three separate heads, giving the first two of those as follows:

(1) Those arising before the traffic is delivered by the consignor to the carrier for transportation at point of origin.

(2) Those arising after the traffic is delivered by the carrier to the consignee at point of destination.

And on the same page it says

> "Concerning matters covered by the first two paragraphs of the summary it is not necessary to make an extended argument, because this court has ruled repeatedly that such matters cannot be used to justify disparities in rates where, as in this case, the transportation is over the same line, in the same direction and between the same points."

It quotes as authorities in support of this portion Wight vs. U. S. 167 U. S. 512, 518; Interstate Commerce Commission vs. Alabama Midland Ry. Co., 168 U. S. 144, 166-167; Interstate Commerce Commission vs. D. L. & W. R. R. Co., 220 U. S. 235, 252-254.

In the Import Rate case in 162 U. S. which we have above quoted, circumstances and conditions arising before the traffic was delivered by the consignor to the carrier for transportation at point of origin were recognized as creating an unlike kind of traffic.

In the opinion in the case of Pittsburgh Plate Glass Co. vs. O. C. C. & St. L. Co., (delivered subsequent to both the cases

of Wight vs. U. S. and Interstate Commerce Commission vs. Alabama Midland Ry. Co., Interstate Commerce Reports No. 13, page 100, the Commission said:

> "Transportation from a seaport of the United States or an adjacent foreign country to an interior American destination in completion of a through movement of freight from a port of a foreign but not adjacent country, whether upon a joint through rate or upon a separately established, or proportional inland rate applicable only to imports moving through, is not a 'like service' to that of the transportation independent and complete within itself of traffic starting at such domestic port, though bound for the same destination.
>
> "It is true the court held in the case of Wight vs. United States, 167 U. S. 512, that the existence of competition did not create 'dissimilar circumstances and conditions' such as to justify discrimination as defined in the second section. But this referred to unjust discrimination as between different shippers over the same line in the performance of a 'like service,' and as we have seen, the transportation of import traffic from the port of entry to an interior destination in completion of a through movement from a point in a foreign country is not a like service to that involved in the transportation of domestic traffic originating at such port, even where the transportation in all other respects is performed under like conditions.
>
> "It follows that the charge of unjust discrimination in violation of section 2 of the act is not sustained."

In the case of Kimble vs. Boston & Albany R. R. Co., Interstate Commerce Reports, volume 8, page 110, also decided subsequently to the Wight case, the same distinction was made as between the export traffic and domestic traffic.

The principle of the Import Rate case is distinctly recogniged in the decisions of this court as being still in force. Neither the decision in Wight vs. U. S. or Interstate Commerce Commission vs. Alabama Midland Ry. Co. have been given in this court the meaning attributed to them in Appellant's brief.

Respectfully submitted,

H. L. BOND, JR.,
W. IRVINE CROSS,
Solicitors for Appellees.

APPELLEES' EXHIBIT A.

Dissenting Opinion of Commissioner Prouty.

PROUTY, *Commissioner,* dissenting;

I agree that the rate can not be varied according to the use to which an article is put; that a rate must be open to the whole public and can not be confined by its terms to an individual or a class; that a railroad can not be accorded a lower rate simply because it is a railroad; but I think that the movement of coal for railroad fuel supply so differs from the movement of coal for private use that a different system of rate making may properly be applied to its transportation.

My thought will be best understood by referring to the system which the Commission thinks should be observed, in comparison with the system now in force, and which the defendant railways desire to continue.

All traffic must move under some published rate, and this applies to property owned by a railroad when moving over another railroad. Ordinarily, a railroad does not consume its coal at the junction point where it receives it from its connection, but hauls it to some other point upon its line, where it is taken from the cars for use upon its locomotives or for other consumption. If a private individual shipped coal from the mine to this consuming point, the rate charged would usually be a joint through rate materially less than the same rates up to the junction point plus the local rate of the consuming road to the point of consumption. Now, the Commission holds that a railroad may bill its coal to the consuming point at the rate which a private shipper would pay. Since the joint through rate is usually so divided between the producing road and the consuming road that the amount received out of it by the producing road is less than the local rate from the mine up to the

junction point it results that by this process the consuming road obtains its freight for less than it would had the traffic been billed to the junction point and received by it at that point. Otherwise stated, the rate upon which this coal moves to the rails of the consuming road is the division of the producing road.

To this system, in practical operation, the defendants urge several objections:

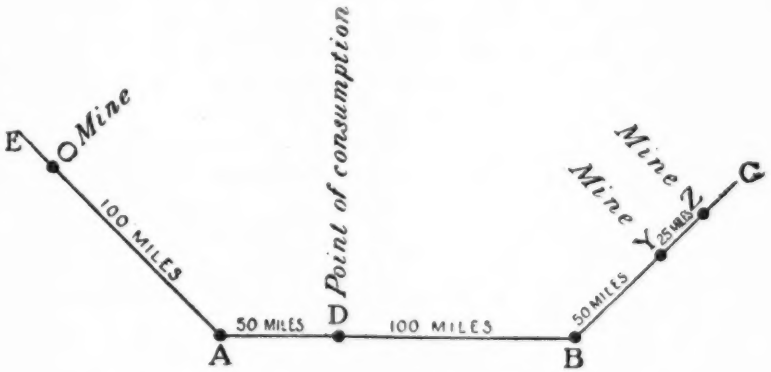
1. The railroad generally buys its fuel f. o. b. the mine. The rate which it pays from the mine to the junction point is the division of the joint rate. That division is a matter of contract between the two roads. It is not published and is not, therefore, necessarily known. It may be changed from day to day without notice to anyone. Coal operators who desire to sell for fuel supply complain that under this system they do not know, and can not know, what the rate is, nor whether that rate will be maintained, nor, if the rate is an unfair one, can they apply to this Commission for its correction. It is further urged that there frequently has been and that there always will be more or less manipulation in these divisions, with the result that certain mines or certain lines of railway will be preferred.

The answer of the Commission to this division is that it may require from the carrier a statement of its division. We may undoubtedly require carriers to inform us of their divisions and to state from time to time any changes in those divisions, but the divisions themselves are not a part of the rate which carriers are required to publish. If they were published there is no requirement which will prevent their change at the will of the carrier. This Commission has no jurisdiction to fix these divisions except in case of a joint rate established by it where the carriers have failed to agree between themselves upon the division.

It seems clear to me that under the system which the Commission says must be followed the actual rate upon which this

traffic moves never can be known; that this rate may be changed from day to day and that it is entirely beyond the power of the Commission to correct it, if wrong. All this follows, of necessity, from the fact that whatever the theory of the case may be, in actual practice the rate upon which this traffic moves is the division of the producing carrier up to the junction point.

2. Assuming that there were any method by which this division could be made public, by which its observance could be secured, and by which it could, if unjust, be corrected, there are still serious objections to that system, which will be best shown by reference to the following diagram;



AB is the consuming road and D the point of consumption. BC is the producing road. Y and Z are mines upon the extreme limits of a group. It is 100 miles from D to B, 50 miles from B to Y, and 25 miles from Y to Z.

As is almost universally the case with coal tariffs, there is a group rate from Y-Z to D, which in this case is $2 per ton, and this rate is divided betwen the railroads AB and BC upon a mileage basis. Upon each ton of coal originating at Y, AB would receive $1.33⅓ and BC 66⅔ cents, while upon a ton of coal originating at Z, AB would receive $1.14 2/7 and BC

85 5/7 cents. If, therefore, AB buys its fuel coal of the mine Y it pays for its transportation to B 66⅔ cents per ton, while if it buys its fuel coal at Z it pays for its transportation to B 85 5/7 cents per ton. Consequently, AB obtains its coal 19 cents per ton cheaper if it pays the same price to the mine at Y as it pays at Z. Since this is a very handsome profit in the mining of coal it is evident that Z can not compete with Y for the fuel supply of AB.

Now, what these carriers desire to do is to make a group rate from Y to Z, somewhat greater than 66⅔ cents, and somewhat less than 85 5/7 cents, which will put the entire group upon the same competitive basis with respect to the fuel supply of the road AB which that group occupies with respect to private consumption at point D.

If, now, we add another producing railroad, AE, and consider shipments from mine O as compared with shipments from mine Y, we have another situation. The distance from D to A is 50 miles and from A to O 100 miles. From O to D the distance is therefore the same as from Y to D, and the rate from these two mines to D for private consumption is also the same. Out of a rate of $1.50 per ton the road AB obtains $1 when the coal originates at Y and 50 cents when it originates at O; that is, if it purchases its fuel at Y it would pay 50 cents per ton for delivery upon its rails while if it purchased at O it must pay $1 for that service. While AB will pay something more for its coal at A than at B, since its own haul from B is somewhat greater, still there would be nothing like the difference expressed in the difference of these divisions, and what the railroads desire in this case is to make such a rate from O to A, in comparison with the rate from Y to B, as will give the mine O the same opportunity to compete for the fuel supply of AB which they enjoy in competing for private supply at point D.

The figures above given are extreme, but the situation illustrated runs all through these coal regions and is of vast im-

portance. Some producing coal roads handle nearly or quite one-half the entire output of their mines for railroad fuel supply. In case of many mines more than one-half the output goes to that purpose, and whether a mine shall exist is often determined by whether it can furnish railroad fuel.

The system which the railroads now have in effect was first established at the request of the operators, but is now approved by all parties concerned, the operators, the producing road, and the consuming road. It is universally recognized that in no other way can the actual rate of transportation be known. In no other way can its maintenance be assured, and in no other way could it if wrong, be corrected by public authority.

The purpose of the act to regulate commerce is to facilitate, not to impede, commercial operations. When shippers and railways unite in asking that a particular thing be done; when that thing is manifestly for the interest and convenience of all parties; when no harm can result, but when, upon the contrary, the fundamental purposes of the act will be promoted, I think we should, if possible, put such a construction upon this statute as will permit it.

It does not seem to be seriously claimed by the majority that the present method of publishing these fuel-supply rates is attended with any practical wrong, but it is said that the second section of the act peremptorily forbids it and that it is therefore unlawful and must be so declared by us.

The second section provides that where the service is like and contemporaneous, the traffic of a like kind, and the circumstances and conditions under which the transportation occurs substantially similar, the rate shall be the same. The majority hold that a railroad stands like any other shipper and that to accord one rate when the shipment is for a railroad and another rate when it is for a private individual is to violate that section. I concede this to be so if the only difference in the transaction be that the freight money is in one case paid by a railroad company and in the other case by a private party,

but I think that there are other incidents of the transaction arising out of the circumstance that this fuel is for railroad supply and is received at the junction point by a railroad, which excepts the case from the operation of the second section.

To understand just what is meant, look at the diagram above given. The rate now published from Y to B when the coal is for railroad-fuel supply is less than the rate for a private shipment delivered at B. Now, it is urged that since the transportation between these points may be at the same time and in the same train it is prohibited by the second section to charge one rate for the car of private coal and a different rate for the car of public coal.

It is said that the Supreme Court of the United States in the *Wight case,* 167 U. S. 512, held that the words "circumstances and conditions," as used in the second section of the act, refer exclusively to the service of transportation and that in order to make out a dissimilarity of circumstance and condition under that section it is necessary to show a different transportation service. I am not prepared to admit that such is the fair interpretation of that case as applied to a set of facts like those now before us; but assuming that it is, nevertheless it seems to me that upon the strict rule of that case as so construed the circumstances and conditions attending the transportation of this fuel coal substantially differ from those under which private coal is handled.

The transportation of the private coal from Y to B involves a delivery at B. To affect this, tracks must be provided upon which that delivery can be made, and the shipper must be given a certain length of time, usually 48 hours and sometimes more, in which to unload his coal. Upon the other hand, delivery of fuel coal is made upon the exchange track of the common carrier for whom the coal is intended, and no use of the car is involved, since as soon as the car is placed upon the exchange track at the service of the connecting carrier, that carrier accounts for the use of the car to its owner and relieves

the railroad handling the coal from Y from that burden. It is perfectly evident, therefore, that the carriage and delivery of the fuel coal costs the producing carrier less than that of the private coal. Here, therefore, is a difference in circumstance and condition which takes the case from the operation of the second section.

It is suggested that the comparison ought to be between the transportation from the mine to the point upon the consuming road where the coal is finally consumed. If this were so the delivery to a private individual is not analogous to that taken by the railroad company itself at the point of consumption. but, certainly, it can not be true that the consuming railroad must handle this traffic upon its own line under a published tariff. It may receive it at the junction point and subsequently transport it over its own rails without reference to any tariff rate.

It is said that if this be so then carriers might make a lower rate in favor of any shipper who would provide tracks and other facilities for the speedy unloading of coal, and that the effect of such rates would be to throw the handling of coal into the hands of large operators who could provide such facilities. Our second section is essentially a reenactment of the English equality clause, and if our court follows in the interpretation of that section, the lead of the English court in its treatment of the equality clause, it must hold that where the cost of transportation and delivery is less a difference in rate is not forbidden. This is well shown by reference to Denaby Main Colliery Co. v. M. S. & L. Ry. Co., 11 App. Cases, 97.

The defendant railway company was engaged in transporting coal from the South Yorkshire field to the port of Grimsby. At that destination team tracks had been provided by the defendant for the delivery of its coal, and the complainant colliery company took delivery of its shipments upon these team tracks.

Bannister, a competitor of the complainant, had provided at Grimsby, yards with tracks and various facilities for the unloading of coal, and it was found that the cost to the defendant of delivering coal into the yards of Bannister was less than the cost of delivering upon its team tracks to the complainant. Under these circumstances the court held that the equality clause of the English act did not apply, but that since the cost of the service to the defendant was less in the case of Bannister than in the case of the complainant, a lower rate might properly be made to him.

If our court holds, as it apparently has indicated in the Wight case, that difference of circumstances and conditions may be shown by showing the difference in cost of service, it is difficult to see how it can avoid the conclusion that, when the cost of service for any reason is less in transporting the freight of one person than in transporting that of another, the second section does not apply. It should be borne in mind that the third section may prevent the making of the lower rate, even though it be lawful under the second. The prohibition of the second section is absolute within the sphere of its operation. If the service is like and contemporaneous, the kind of traffic like, and the circumstances and conditions of the transportation the same, then the rate must also be the same. The third section is more elastic. It forbids undue discrimination or advantage, and it is for us to say, upon consideration of all the facts, whether that section has been violated.

It seems to me, therefore, that the circumstances and conditions attending the transportation and delivery of this fuel coal are different from those under which private coal is handled, and that for this reason the second section does not forbid the making of different rates for the different services, and if this be so then the second section has no application whatever. I think, however, that there is a broader and more fundamental ground upon which the operation of that section can be distinguished. This fuel coal is not, to my mind, a like kind of traffic with private coal nor is its carriage a like

service within the meaning of that section. Even though the physical service performed be exactly the same it is not a violation of the second section, upon the part of the carrier, to demand and receive a different compensation for that service.

If we were to follow the history of a dozen cars of coal taken on at the same mine, moving in the same train and delivered at B upon the same track to its connection, we might find that the carrier received a different rate for every car. It is true that this difference in compensation might be due to the fact that the traffic was intended for different points and that the division of the carrier differed according to the destination of the shipment; but it is also true that carriers habitually make what are known as proportional rates up to the junction point which are less than the local rate. Traffic handled upon through rates or upon proportional rates is not a like kind of traffic with that which begins at the mine and ends at the junction point, nor is the service a like service, and even though the cost of the transportation is precisely the same, the carrier may impose a different charge.

The fact that this fuel coal is to be consumed at some point beyond the junction; that from the junction point it is carried by the railroad which is to consume it, and which is or may be entitled to a division of the through rate to the point of consumption, gives this business traffic incidents which do not attach to ordinary private coal. It is this fact which renders it impossible to know the rate upon which the fuel coal is handled; to compel a publication and maintenance of that rate; or to control the rate by Government authority. This business is closely analogous to export and import traffic.

It is well understood that the rate applied on certain commodities when for export is lower to nearly if not all ports of export in the United States and Canada than when for domestic compensation. It may be true that in most instances the physical incidents of the transportation are somewhat different in the case of the export than of the domestic business, but this is not the broad ground upon which the lower rate is

justified. It is because the carriers in the treatment of this export traffic may consider the point of origin, the point of final destination, the possibility of transporting this traffic by different avenues, the fact that the commodities transported must compete abroad with similar commodities produced in other countries which justifies the lower export rate. If it should turn out in some individual cases that the cost of handling business was exactly the same whether for export or for home consumption still the export rate would undoubtedly be sustained. To deny carriers the right of maintaining lower export tariffs than apply to domestic business would shut up two-thirds of the ports of export in the United States.

Exactly the same thing is true, and for exactly the same reason, of imports. This business may move from the port to the interior destination in the same train and for precisely the same expense as domestic traffic, but it need not for that reason bear the same rate. It is not a like service. This is well pointed out in the Pittsburg Plate Glass case, 13 I. C. C. Rep., 87, in which the Commission said:

> Transportation from a seaport of the United States or an adjacent foreign country to an interior American destination in completion of a through movement of freight from a port of a foreign but not adjacent country whether upon a joint through rate or upon a separately established or proportional inland rate applicable only to imports moving through, is not a "like service" to that of the transportation independent and complete within itself of traffic starting at such domestic port, though bound for the same destination.
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> It is true the court held in the case of Wight v. United States, 167 U. S., 512, that the existence of competition did not create "dissimilar circumstances and conditions" such as to justify discrimination as defined in the second section. But this referred to unjust discrimination as between different shippers over the same line in the performance of a "like service," and, as we have seen, the transportation of import traffic from the port of entry to an interior destination in completion of a through movement from a point in a foreign country is not a like service to that involved in the transportation of domestic traffic originating at such port even where the transportation in all other respects is performed under like conditions.
>
> It follows that the charge of unjust discrimination in violation of section 2 of the act is not sustained.

The lower import rate has been expressly approved by the Supreme Court of the United States in the Import Rate case, 163 U. S., 197. In that case the traffic originated at Liverpool and was intended for San Francisco. It moved to New Orleans by water and from New Orleans to San Francisco by rail. The amount received by the rail carrier was materially less than the rate for the transportation of exactly the same articles from New Orleans to San Francisco, but the court held that this was not prohibited by the act to regulate commerce. The court held in that case that the import traffic was not a like kind of traffic with that originating at the port of import.

So here it seems to me that when all the circumstances which surround this fuel-coal traffic are considered it is not a like kind of traffic, under the second section, with coal transported for private consumption, nor is the service a like service, and while there may be to-day grave doubts as to the final decision my belief is that the Supreme Court should and will finally so hold. I can see no other theory upon which rates which are vital to the handling of the business of this country can be justified.

The second section is directed against discrimination between shippers. To charge one person one rate and another person another rate for the performance of exactly the same service is a wrong which that section was intended to prevent. But there is no wrong when the private consumer who receives his coal at B is charged a different rate for the transportation from Y than is imposed for carrying railroad coal from Y to B and there delivering it to the connecting railroad for use at the various points upon is line. The wrong does not exist because the service is not the same, and since there is no wrong the statute ought not to be so construed as to impose a penalty.

It is suggested that if railroads be allowed to make special rates for the transpetation of coal when for railroad use the same privilege must be extended as to other railroad supplies; and this is probably true, although the convenience of the rail-

ways in seeking to avoid a multiplicity of tariffs, and perhaps the discretion of this Commission, might to some extent limit the exercise of that privilege. I for one think it would be much better if all the principal railway supplies did move upon tariffs of this character.

In my opinion the method now in vogue leads to much evasion and discrimination. Our last annual report makes reference in two cases—United States v. M. & R. R. R. Co. and United States v. L. S. & M. S. Ry. Co.—in which fines were imposed for illegality in the transportation of company material. In each case the traffic was billed to that point where the best division could be obtained and stopped off at an intermediate point. While the fraud in these two instances was detected and punished there were probably hundreds of instances which escaped observation.

An examination of our correspondence files will show that trouble is constantly arising from the fact that the railroad bases the price for its supplies upon the division which it expects to obtain from the point of origin to the junction point instead of upon the local rate up to that point. It is evident that carriers select for the billing point not that station at which the traffic is to be actually used but at that at which the most favorable division can be obtained. To my mind it would be better on all accounts if carriers were required to publish a rate up to the junction point upon all railway supplies which move in very considerable quantities. Such a rate would be known to every one, would be paid by all alike, and could be corrected if discriminatory or unjust.

It is pointed out that these tariffs do not apply to fuel for the use of electric railroads but only for steam railroads. The kind of motive power used can not, it seems to me, distinguish between different railroads in this particular, but this is not a reason for refusing to permit the publication of these rates. When attention is called to an actual discrimination of this kind, resulting from one of these tariffs, it can be and should be corrected.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE INTERSTATE COMMERCE COMMISSION and The United States, appellants,
v.
THE BALTIMORE AND OHIO RAILROAD Company; The Pennsylvania Railroad Company, The Pennsylvania Company, et al., appellees. } No. 719

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

This case involves the legality of what have generally been known as the "restricted coal rates."

It comes up on appeal under section 2 of the Commerce Court act of June 18, 1910 (36 Stat. L., 539, 1146), from an order granting (without opinion) a preliminary injunction against the enforcement of an order of the Interstate Commerce Commission.

The essential portion of the commission's order is as follows, and the question is whether it should have been enjoined:

> *It is ordered*, That the above-named respondents and interveners be, and they are hereby, directed, on or before the 15th day

of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from their present practice of maintaining and using tariffs on coal, the rates in which are restricted to shipments of or for certain consignors or consignees, or when the coal transported is for a particular use.

It is further ordered, That said respondents and interveners be, and they are hereby, directed, on or before said 15th day of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from maintaining any rates on coal which are applicable only to the shipments of certain consignors or consignees, or when the coal transported is put to a designated use, and which rates are not open alike for all shippers. (R., 27.)

ARGUMENT.

In its terms this order, so enjoined, was directed exclusively against the restriction of rates to coal of certain consignors or consignees or for designated uses; and it would seem to be directly within the principle laid down by this court in—

Int. Com. Com. v. *D., L. & W. R. R.* (The Forwarders' case), 220 U. S., 235.

N. Y., N. H. & H. R. R. Co. v. *Int. Com. Com.* (The Coal Commodity case), 200 U. S., 361, 391–395.

Since these decisions we assume that the illegality of a discrimination based exclusively on the identity of the shipper or of the consignee, or on the intention with which the goods are shipped or received, or on

the use to which they are put, is no longer open to argument.

This appears to have been recognized by the petitioners, for they seek to defend the discrimination as based on circumstances *dehors* this specific line of distinction stated in the order and in their published tariffs. Their claim (petition, p. 3) is that the following incidents, alleged to be attached to the transportation of coal for railroads or railroad uses, make that coal different for transportation purposes from the same coal if shipped for other consignees or for other uses:

(*a*) The delivery is made on the exchange tracks used for all through shipments and not on the side tracks used for local deliveries. (Tr., p. 3.)

(*b*) No free car time is allowed.

(*c*) No liability continues after the car is placed on the exchange track.

(*d*) The division of the through rate from the junction point to the point of consumption belongs to the consuming carrier.

(*e*) Most of the coal is for locomotive use, and the fueling stations (the final destinations on the consuming line) can not be predicted at the time of shipment.

(*f*) There is no commercial competition between coal used for railroad fuel and for other uses.

This is as if the railroads, having published a rate of $1 for goods if shipped to Jones and a rate of $2 for the same goods if shipped to Brown, should seek to justify by alleging that in fact Jones's sidetrack

was different from Brown's, or that Jones used his free time and Brown did not, or that Jones was litigious while Brown was not, and so on.

In fact, the commission found both that the circumstances claimed to justify the discrimination did not exist as to all railroad coal to which the benefit was given (Tr., p. 17), and also that they did exist as to most electric-railway coal to which the benefit was not given (Tr., p. 13).

The commission also found that the differences in circumstances, even if existing coextensively with the definition made by the rates, were so trifling and unsubstantial as not to justify any difference in rates.

On both these points the position of the commission was clearly stated as follows (Tr., p. 16):

> There can be no substantial difference in the conditions of transportation of this railway-fuel coal from a point on the producing line to a point on the consuming line as compared with the transportation of commercial coal between those same points. There may be slight differences in the terminal service required at destination, but that is true as to all shipments to any point of importance. It requires more, and somewhat more expensive, service to deliver one shipment than to deliver another, but that difference is not at all recognized in the rates, which are the same. The difference in transportation conditions must be substantial in order to remove the application of section 2 of the act. If a lower rate upon railway-fuel coal is warranted because the railroad has facilities for receiving coal which

> make the cost of the service less, any shipper who provided like facilities must be entitled to the same rate accorded the railway.

These conclusions of the commission are enforced both by the fact that the railroads did not themselves define the restrictions in terms of the conditions now sought to justify them, and by the fact that they made the discriminations in rates so great as to be self-evidently disproportionate to those alleged differences. For example, commercial shipments of coal from West Virginia pay a rate of $1.90 per ton to Potomac Yard, D. C., and $1.70 to Strasburg, Va.; but the Elkins Coal and Coke Company pays on the same coal, if shipped for use of the Southern Railway, a rate of only $1.34 to either point. (R., 37, 38.) Here we have a difference as great as 56 cents a ton (and in two other instances as high as 65 cents a ton, R., 36) alleged to have been founded on the trifling circumstances above enumerated; and also we find the railroad fuel coal going at the same rate to Potomac Yard, D. C., as it pays when going to Strasburg, Va., while coal for other uses pays 20 cents more to the former point than it pays to the latter.

However, we do not desire to enter into details as to the considerations pro and con, because for the purpose of this appeal it seems sufficient to say that all those considerations went merely to two questions of fact:

First. Did the differences alleged exist?

Second. If they existed, were they sufficiently substantial to justify a variation in the rates?

The weighing of the multitude of facts presented upon these questions and the striking of the balance was plainly the exclusive function of the Interstate Commerce Commission, whose determination of such questions of fact is, and must be, final; and it is not the function of the Commerce Court, which is empowered to pass only upon questions of law.

The face of the report of the commission shows that, as a tribunal appointed by law and informed by experience, it had abundant and proper evidence at its command upon which to arrive at its conclusion.

No charge is made that the petitioners were denied a full hearing, or that the commission in any manner transcended its power or authority, or that the commission in any way failed to proceed in all respects in conformity to the statute, or that anything was considered by the commission which should not have been considered, or that anything was not considered which should have been considered.

The finality of the conclusion of the Interstate Commerce Commission under such circumstances has been announced by this court again and again and again—so often, indeed, that the court as long ago as 1906 began to state that it was indulging in what it called "tiresome repetition." (206 U. S., p. 466; 218 U. S., p. 110.)

Still it would seem that indefinite continuance of the repetition is necessary.

The petition presented no equity. The injunction was improvidently granted, the interlocutory order and decree should be reversed, and the cause should be remanded with directions to dismiss the petition.

Respectfully submitted.

WINFRED T. DENISON,
Assistant Attorney General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

JANUARY, 1911.

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INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES *v.* BALTIMORE AND OHIO RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 719. Argued January 12, 15, 1912.—Decided June 7, 1912.

An interstate carrier may not charge a different rate for the transportation of raiload-fuel coal to a given point than for the transportation of commercial coal to the same point. It would be an illegal preference or discrimination under § 3 of Act to Regulate Commerce.

Tariffs are but forms of words, and the Interstate Commerce Commission, in the exercise of its powers to administer the Act to Regulate Commerce, can look beyond the forms to what caused them and what they are intended to, and do, cause.

A railroad company cannot be made a favored shipper and given a lower rate on the same commodity to the same point than other persons.

A railroad company is not to be put on the same basis as a locality and entitled to preferential rates to accommodate competitive conditions. *The Import Rate Case*, 162 U. S. 197, distinguished.

THE question in the case is whether railroad companies may charge a different rate for the transportation of coal to a given point to railroads than to other shippers, the coal being intended for the use of the railroads as fuel.

The Interstate Commerce Commission held that a charge of a different rate was an unlawful discrimination against other shippers and made an order requiring a cessation of such charge. The execution of the order was enjoined by the Commerce Court.

A number of railroads are petitioners and we shall refer to them as the companies.

The companies attack in their petition the order of the Interstate Commerce Commission on several grounds, which may be summarized as follows: The movement of coal traffic from the point of origin to the point or points of junction to receiving carriers is different from the movement of coal to be delivered locally at such junction points.

The traffic is not governed by the rates published under the Act to Regulate Commerce which apply to the traffic in coal not intended for use by consuming railroads, because the charges go to the carrier itself. If the coal be shipped under a through rate applicable to other coal the actual rate upon which it moves to the rails of the consuming road is the division of the through rate going to the roads over which the traffic moves to the junction point with the rails of the consuming road. The division of the rate beyond that point goes to the consuming road itself.

All but an inconsiderable part of such coal is necessary and intended for use as fuel in locomotives. The fueling stations are often many, and are located at convenient points along the line at varying distances from the junction points, and it is not possible at the time of shipment to tell at what point a carload of coal will be needed. If made on a through rate they must be billed and transported to a point to which the through rate is published. Even if a centrally located distributing yard for fuel be established, and all shipments billed on a through rate to that yard, there must be a reverse movement of the coal between that point and the point of junction.

The fact that fuel coal on the line of a consuming carrier is not governed by the published rates makes the commercial competitive conditions different between such coal and other coal. The value to the shipper is not the same or measured by the same conditions. There is no competition between the fuel coal and other coal.

Because of the circumstances and conditions differentiating the traffic in fuel coal the companies have for a number of years past published and filed, as required by law, separate tariffs of the rates to be charged and received by them for the transportation of such coal from points of origin to the junction point of delivery to the consuming carrier. The tariffs vary in their definitions or descriptions of the traffic to which the rates apply, but in each case the traffic is such that it would move in reality, not under the published through rates, but would move under the special conditions which have been stated. Some of the tariffs apply only to coal intended for use and used for locomotive fuel. The rates named in the tariffs are open and available to all producers and shippers, if the shipments be made under the special conditions stated.

On January 4, 1910, the Interstate Commerce Commission, of its own motion, instituted an inquiry under an

order of that date entitled, "In the matter of Restrictive Rates," Docket No. 3053, making the Baltimore & Ohio and the Pennsylvania Railroad companies parties to the proceeding. The other companies from time to time were admitted as intervenors. Testimony was taken, argument heard, and the Commission entered the order complained of in which the Commission required the companies to cease and desist, on or before May 15, 1911, and for a period of two years to abstain from using the tariffs on fuel coal stated.

The Commission erred in its construction of the Act to Regulate Commerce in that it held the facts and circumstances found by it did not distinguish fuel coal from other coal, and that the different conditions of their transportation were not in law circumstances and conditions necessary or proper to be considered in applying the provisions of § 2 of the act.

The Commission erred in holding that the rates on fuel coal under § 2 should be no more nor less than rates for the shipment of other coal from the same point of origin for local delivery at the junction point, the circumstances and conditions showing conclusively that the services done in the transportation of them, respectively, are not alike nor substantially similar, within the meaning of the Act to Regulate Commerce.

The Commission erred in holding that fuel coal should be transported under through rates, as other coal, and that it was unlawful for carriers to publish or charge any rates other than the through rates agreed upon going to the line of the terminal carrier to be used by it in its business as a common carrier. And that, as the charges on such terminal carrier's line must be borne by it, the Commission erred in holding that such circumstance did not differentiate the traffic in such coal from the traffic in other coal, and did not constitute a substantial difference under § 2 in the conditions of transportation.

The Commission erred in holding, further, that any difference in the tariff for fuel coal and not applicable to all other coal was unjustly discriminatory, in violation of § 3.

It appears on the face of the report of the Commission, it is alleged, that it proceeded in making the order upon its view of §§ 2 and 3; that it did not find it necessary to consider any specific tariff or tariffs or the rates named thereby; that the difference in conditions affecting the respective tariffs could not be considered as distinguishing them. And it is alleged that the findings of the Commission are findings of law, as well in regard to the violation of the third section of the act as in regard to violation of the second section. Irreparable damage is alleged, and the alternatives presented of desisting from the carriage of fuel coal at the expense of the loss of large and valuable revenues or accepting divisions of through rates, on both fuel coal and other coal, which will give the companies, as originating or intermediate carriers, a much lower compensation for both classes of traffic than they are now receiving and would continue to receive but for the order of the Commission.

In either case the loss will amount to many thousand dollars. There will be loss, it is alleged, to the producers of fuel coal who have sold coal under contracts for future delivery at junction points, and loss also to producers and shippers who depend on the railroad-fuel business to enable them to operate their mines at all.

A final decree is prayed for the annulment of the order and a temporary injunction enjoining and suspending it pending final hearing and determination.

The petition was supported by affidavits made by a number of coal producers and shippers.

The answer of the Interstate Commerce Commission is directed principally at the third paragraph of the petition, and charges against it as follows: Its allegations relate to

comparisons between coal, on the one hand, consigned to a railroad company, and coal, on the other hand, consigned to some other party. The former is called railroad-fuel coal, the latter is known as commercial coal. In each instance, however, regardless of the consignee, the point of origin and the point of destination of the shipments is the same, but the rate charged for transporting fuel coal is much less than the rate exacted for the transportation of commercial coal over the same line, in the same direction and between the same points. Schedules or tariffs providing for such differences in rates have been heretofore established and put in force and are now maintained and enforced by the companies.

Where the destination is a junction which is a point of connection between the lines of two or more of the companies, the movement of coal, fuel and commercial, is the same, except that at such destination the cars containing fuel coal are ordinarily placed upon what is called an exchange track, which is used in common by the connecting carriers, while the cars containing commercial coal are usually placed upon the side track of the delivering carrier. The cost of delivering both kinds of coal is practically the same, depending upon the nature of the delivery facilities furnished by the companies. Therefore, the cost of delivering fuel coal may be and is less than the cost of delivering the commercial coal, but the reverse is sometimes the case. It is alleged, however, that such differences are similar to differences pertaining to some shipments of commercial coal compared with other shipments.

Generally what is called "free time" is allowed by the companies, that is to say, a certain period of time for unloading the coal is allowed. If the coal is unloaded within that time, no charge is made for the use of the car. If that time be exceeded a charge of $1.00 for each day or fraction of a day in excess of the "free time," known as a demurrage charge, is exacted by the companies, while the

compensation paid by one carrier to another carrier for the use of a car owned by the latter is twenty-five cents a day. Where the coal transported is fuel coal no "free time" is allowed, nor is such demurrage charge exacted or collected. These differences, however, are offset, and much more than offset, by the differences in the rates of transportation between the different coals.

Where the destination of the shipment of coal is not a point of connection between the lines of two or more of the companies the circumstances and conditions pertaining to the transportation and delivery of coal are the same as above described, except that at such destination there are no exchange tracks used in common by two or more of the companies. Where the shipment passes over more than one line of railway to such destination, delivery by one of the companies to another is made in the same way and under similar circumstances and conditions regardless of whether the coal be fuel or commercial.

The lower rates established by the companies and applied by them to the transportation of fuel coal are not open alike to all shippers but are, by reason of the schedules and tariffs above mentioned and by reason of the practices of the companies, confined to shippers of fuel coal and denied to shippers of all other coal, including commercial coal.

The Commission denies the errors attributed to it, and alleges that its report shows as follows: "We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination."

The Commission alleges (somewhat singularly, on information and belief) that it considered all facts, circum-

stances and conditions pertinent to the subject-matter of the order, including degrees of difference and distinction, and each and all of the tariffs and rates of the companies which are affected by the order, and did not entertain the opinion attributed to it, that the facts, circumstances and conditions affecting the particular traffic could not be lawfully considered by it as distinguishing the traffic in railroad-fuel coal from the traffic in other coal.

It is alleged that the traffic is interstate, and that fuel coal as compared with other coal, including commercial coal, is a like kind of traffic; that the services performed by the companies in connection with the transportation of fuel coal as compared to the services performed by them in connection with the transportation of other coal, including commercial coal, are alike and contemporaneous, and are performed under substantially similar circumstances and conditions. It is hence alleged that the companies are violating §§ 2 and 3 of the Interstate Commerce Act.

The final allegation of the Commission is that the matters are within its jurisdiction, and that therefore the correctness of its findings is not open to review in the Commerce Court or any other court.

Mr. P. J. Farrell for the Interstate Commerce Commission:

In failing to dismiss the bill for want of equity, and in granting the temporary injunction, the Commerce Court committed errors which should be corrected by a reversal of the decree.

Circumstances and conditions arising before traffic is delivered by the consignor to the carrier for transportation at point of origin, and those arising after the traffic is delivered by the carrier to the consignee at point of destination, cannot be used to justify disparities in rates, where, as here, the transportation is over the same line, in the same direction, and between the same points.

Wight v. *United States*, 167 U. S. 512, 518; *Int. Com. Comm.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 166, 167; *Int. Com. Comm.* v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235, 252–254. If circumstances and conditions arising after the traffic is delivered by the consignor to the carrier at point of origin and before it is delivered by the carrier to the consignee at point of destination, but which are wholly artificial and entirely created by the carriers, may be used to justify such disparities, a carrier cannot be prevented from indulging in such discriminations as it may wish to make, to the extent at least of charging one party a rate greater than the rate it contemporaneously accords to another party, for the transportation of a like kind of traffic, over the same line, in the same direction, and between the same points.

While a carrier may transport its own property at will from one point to another upon its own line, regardless of the rates named in its published schedules, provided the title to that property does not change while it is in transit; and the division of a through rate for the transportation of property from a point of origin on the line of one carrier to a point of destination on the line of another carrier are a matter of agreement by and between the carriers who perform the transportation service; a carrier who uses the property may not, for the purpose of obtaining, for the transportation of the property from such point of origin to a point of intersection between its own line and the line of such other carrier, a rate which is less than the rate contemporaneously exacted from other shippers for the transportation of a like kind of property from said point of origin to said point of intersection, ship the property from such point of origin to a point of destination on its own line, under a through rate published and filed and made applicable to such transportation, and, when the property reaches its own line, either use the property at such point of intersection or transport it to a point on its

own line other than the point to which such through rate applies, and then pay for the transportation from such point of origin to said point of intersection, not the rate applicable to the transportation between those points, but the division of the through rate which goes to such other carrier, as aforesaid. And if it does so it thereby subjects itself to the penalties provided for in the act and made applicable to cases of false billing and misrepresentation. *Wight* v. *United States, supra; Capital City Gas Co.* v. *Central Vermont Ry. Co.*, 11 I. C. C. Rep. 104. See, also, *Matter of Contracts of Express Companies*, 16 I. C. C. Rep. 246; *Hitchman Coal & Coke Co.* v. *Baltimore & Ohio R. R. Co.*, 16 I. C. C. Rep. 512.

The Commerce Court erred in substituting its own judgment for that of the Commission concerning the character of the traffic, transportation services, discrimination and preference and prejudice involved. *Int. Com. Comm.* v. *Delaware, L. & W. R. R. Co., supra.* See, also, *Balto. & O. R. Co.* v. *Pitcairn*, 215 U. S. 481; *Southern Pacific Co.* v. *Int. Com. Comm.*, 219 U. S. 433.

The court erred in entering the interlocutory decree and granting the temporary injunction, without complying with the requirements of § 3 of the Commerce Court Act of June 18, 1910.

If the Commerce Court may, simply as a matter of discretion, for its own convenience, the convenience of carriers, or some other similar reason, enjoin temporarily enforcement of an order of the Commission, it may destroy, for all practical purposes, the power of the Commission and render impossible its regulations.

Under present conditions, there appears to be nothing for this court to do except to examine the entire record and determine whether the matters included therein justify the action taken by the Commerce Court.

A construction of the law which makes necessary such a method of procedure is not reasonable, because it in-

dicates that the Congress attempted to do something which is in excess of its power under the Constitution; that is, confer upon this court original jurisdiction in the premises. *Baltimore & Ohio R. R. Co.* v. *Int. Com. Comm.*, 215 U. S. 216; *Southern Pacific Co.* v. *Int. Com. Comm.*, 215 U. S. 226.

Congress neither intended to, nor could, confer upon the Commerce Court, or any other court, legislative discretion. *Int. Com. Comm.* v. *Illinois Cent. R. R. Co.*, 215 U. S. 452.

Mr. Assistant Attorney General Denison, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for the United States:

In its terms the order enjoined was directed exclusively against the restriction of rates to coal of certain consignors or consignees or for designated uses; and is directly within the principle laid down in *Int. Com. Comm.* v. *Delaware, L. & W. R. R.*, 220 U. S. 235; *New York, N. H. & H. R. R. Co.* v. *Int. Com. Comm.*, 200 U. S. 361, 391–395.

The illegality of a discrimination based exclusively on identity of the shipper or consignee, or on the intention with which the goods are shipped or received, or use to which they are put, is no longer open to argument.

The finality of the conclusion of the Commission under the circumstances of this case has been repeatedly announced by this court. 206 U. S. 466; 218 U. S. 110.

Mr. W. Irvine Cross and *Mr. Hugh L. Bond, Jr.*, for appellees:

The filing of tariffs in which the traffic in railroad fuel coal is treated as a separate traffic from the traffic in commercial coal between the same points is not a violation of § 2 of the Act to Regulate Commerce.

When Congress, in the commodities clause, wished to describe the only commodities that could be transported

by a railroad without any tariff at all, it described them, identified them, by the very language that the railroads have employed to identify the commodity carried in this traffic.

A special rate cannot be given to a particular consignee based simply on his personality, but a consignee may receive a special rate on a special kind of traffic. Neither can a special rate be given because of the use to which a commodity is to be put; but it would be a strange principle that a rate could not be influenced by the place where the commodity was to be used, or the transportation it must still undergo in reaching the point of use. A railroad, as distinguished from a railroad company, is not a person. It is rather in the nature of a geographical division, and extends through long distances. A railroad's use of coal for fuel is not different from the use of it by any other consumer of fuel. The service in delivering it at the junction point differs in the fact that the coal still has to be transported through long distances to secure its use at all.

The railroad fuel rates are open and available alike for all shippers, that is, for all shippers wishing to engage in the special traffic on which the rates are made. They are not restricted to certain shippers. They are not conditioned upon the commodities being put to a certain use. They are limited to a service where the commodity is subject to further transportation under the commodities clause, before reaching the point of use. The analogy in principle of the railroad-fuel traffic to the import traffic and the export traffic is complete.

The Commission's method of filing fuel coal rates is illegal under § 6 of the Interstate Commerce Act and Elkins Act. Congress never intended that the tariffs prescribed in § 6 should cover the transportation of the carrier's own property.

The Commerce Court had power to review on appeal

the construction put by the Commission on the Act to Regulate Commerce even though the subject-matter of the order was within the jurisdiction of the Commission and the order did not violate any constitutional right.

As to whether or not import traffic constitutes a like kind of traffic with domestic traffic between the same points, see *Import Rate Case*, 162 U. S. 197.

As to the right of the Commission to ignore circumstances and conditions in fixing rates, see *Louisville &c. R. R. Co.* v. *Behlmer*, 175 U. S. 648; *East Tennessee &c. Ry. Co.* v. *Int. Com. Comm.*, 181 U. S. 1; *Southern Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297; *Int. Com. Comm.* v. *Northern Pac. Ry. Co.*, 216 U. S. 538; *Int. Com. Comm.* v. *Delaware, L. & W. R. R. Co.*, 216 U. S. 531: 220 U. S. 235.

The question whether or not the Commission can refuse to consider the features of the fuel traffic, as making it an unlike traffic with the traffic in commercial coal, is a pure question of law, difficult to distinguish in principle from that which was decided in the *Import Rate Case*, *supra*.

Traffic in railroad fuel coal is different from the traffic in commercial coal within the meaning of the term "traffic" in § 2 of the Act to Regulate Commerce, and the service performed in transporting coal destined for the railroad fuel market is not a like service to that performed in transporting coal destined for the commercial market. The values of the services are commercially different and determined by different factors.

In the *Import Rate Case*, 162 U. S. 197, circumstances and conditions arising before the traffic was delivered by the consignor to the carrier for transportation at point of origin were recognized as creating an unlike kind of traffic. See, also, *Pittsburgh Plate Glass Co.* v. *O. C. C. & St. L. Co.*, 13 I. C. C. Rep. 100; *Kimble* v. *Boston & A. R. R. Co.*, 8 I. C. C. Rep. 110.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The case involves the consideration of §§ 2 and 3 of the Interstate Commerce Act. Section 2 provides that if any common carrier shall directly or indirectly charge or receive from any person or persons a greater or less compensation than it charges or receives from any other person or persons "for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of discrimination. . . ."

Section 3 is directed against giving preferences or advantages to persons, localities or descriptions of traffic in any respect whatsoever and subjecting any person, locality or traffic "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The companies contend that the Commission applied these sections to the facts found by the Commission, none of them being disputed, and that, therefore, the findings of the Commission are conclusions of law. On the other hand, the Commission charges that its findings are those of fact and exclusively within its jurisdiction, and not open to review by the Commerce Court or any court. Many of its assignments of error are expressions of this view. The other assignments assert in various ways and with many shades of particularity that the Commerce Court erred in disagreeing with the Commission in regard to the traffics in the different coals, not only in its decision, as indicated in its injunction, in the matters affecting such traffic, but in substituting its judgment for that of the Commission.

The facts are certainly undisputed, or, to put it differently, the circumstances and conditions which determined the order are certainly not in controversy; and while certain general inferences are disputed which may be

called inferences of fact, yet we think "power to make the order, and not the mere expediency of having made it, is the question" presented. *Int. Com. Comm.* v. *Illinois Cent. R. R. Co.*, 215 U. S. 452, 470. In other words, that the question presented by the petition is that the order of the Commission was not merely administrative, but proceeded from a construction of §§ 2 and 3 as applicable to the conditions which affected the traffic in the different kinds of coal and that the different charges for transportation constituted violations of those sections. The Commerce Court, therefore, had jurisdiction of the petition and jurisdiction to enjoin the order of the Commission if the court considered that the order would cause irreparable injury. Section 3 of the act creating the Commerce Court gives that court the power to "enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission, in a suit brought in the court against the United States." Whether the court erred in its judgment is now to be inquired into.

In its most abstract form the simple statement of the controversy is whether the companies may charge a different rate for the transportation of fuel coal to a given point than for the transportation of commercial coal to the same point. But when we depart from the abstract, complexities appear and attention is carried beyond the consideration of points equally distant, shippers equally circumstanced and traffic affected by similar circumstances and conditions. It is asserted that there are disparities between the traffics and qualifying circumstances which the Commission disregarded and, in error, held that traffic in fuel coal could not be distinguished from the traffic in commercial coal.

The Commission insists upon the simplicity of the problem and contends that there is nothing in the conditions of the traffic which dispenses with the clear legal duty of the companies under the Interstate Commerce Act to

carry for all shippers alike. The Commission says: "We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination." Its position thus expressed the Commission has supplemented, we are told by the companies, by its Conference Ruling No. 324, published June 19, 1911, as follows: "Division on Company Coal.—Upon Inquiry, Held, That it is unlawful for carriers to make special and discriminatory divisions of joint rates upon locomotive fuel as between an originating or participating carrier and a purchasing carrier. In the division of joint rates a railroad must be treated precisely as any other shipper is treated, and the Commission will regard any special division as a device to defeat the published rate. All divisions upon fuel coal must be made in good faith without respect to the fact that one of the carriers is the purchaser of such coal."

The issue of principle between the Commission and the companies is very accurately presented, and we come to consider whether there are differences in the traffic of fuel coal which distinguish it from traffic in commercial coal, and which, as contended by the companies, make the traffic dissimilar in circumstances and conditions, or whether the opposite is true, as decided by the Commission.

The circumstances and conditions which may so far be considered as distinguishing traffics so as to take from different transportation charges the vice of preference have been described by this court. In *Wight* v. *United States*, 167 U. S. 512, 518, it is said: "It was the purpose of the section [2] to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under

the same circumstances of carriage, are compelled to pay different prices therefor." These words are given more precision by the declaration "that the phrase, 'under substantially similar circumstances and conditions,' as found in section 2, refers to matters of carriage, and does not include competition." And this was repeated in *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 161, 166. The facts in both cases give significance to the rulings. In the first case the charges to the shippers were the same, but one was given extra facilities; in the second case the extraneous effect of competition was excluded as an element in the application of the section. There is also example in *Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235. It was there held that a carrier could not look beyond goods tendered to it for transportation in carload lots "to the ownership of the shipment" as the basis for determining the application of its established rates. Do the circumstances and conditions in this case give a greater power of discrimination and justify the lower charge to railroad-fuel coal? It is admitted that the fact that a railroad is the shipper or consumer is not a circumstance or condition that affects the carriage, nor can the different uses to which the coal may be put, and it would seem necessarily that any other extraneous condition or circumstance could have no greater potency. Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before, or their attitude and interest after, transportation? It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges. See *Pennsylvania R. R. Co.* v. *International Mining Co.*, 173 Fed. Rep. 1.

But what are the differences in the traffics which are asserted by the companies? We have already condensed them from the pleadings, but we may use the expression of their ultimate elements by the companies, omitting, for the time being, the physical differences in facilities. They say: "When the railroad-fuel coal is consigned to the junction point, as provided in the present system of tariffs, the circumstances and conditions that differentiate this traffic from the traffic in commercial coal consigned to the same point are:

"1. The fuel coal so shipped is not in competition with the commercial coal consigned to the same point.

"2. It is in competition with other coals coming upon the line of the consuming road at other points, with which the commercial coal is not in competition.

"3. The transportation service is different, in that commercial coal at the junction point has reached the point of use, while railroad-fuel coal reaching the consuming railroad at the junction point is still subject to a transportation service before reaching the point of use,—a transportation under the 'Commodities Clause' and not under tariff."

These elements the Commission disregarded, it is contended, and that while it found a similarity in the traffics it did not consider or discuss the two most important features of difference—"the two features" which make the traffics unlike, that is, that railroad-fuel coal "does not come into competition with the commercial coal, and is in competition with coals coming on the railroad's line at other points." But such features do not affect the carriage, qualify or alter the essential service, which is to get an article from one place to another. The greater or less inducement to seek the service is not the service. Such competition, therefore, is as extraneous to the transportation as the instances in the cases cited. And equally so is the other "feature" that the fuel coal may be destined for

consumption beyond the junction point. The circumstances do not alter the fact that it and commercial coal go to the same point, and are delivered at the same point. There is, it is true, a difference in the manner of delivery, depending upon the difference in the facilities possessed by the railroads and other consignees.

The Commission, as we have seen, especially disclaimed holding that the rate to the junction point must be paid on shipments going beyond that point, and insisted that it only held that the charges to that point should be the same to all shippers, and rates through that point should also be the same to all shippers. And the Commission said that the testimony established that the service as to the coals was alike when they go beyond the junction point. The Commission, therefore, considered alone the service, disregarding circumstances and conditions which were mere incidents of it and had relation only to the respective shippers.

But the companies say, in criticism of the reasoning and order of the Commission, they are permitted to do indirectly what they want to do directly, that an easy way of evasion of the prohibiting order is to make a joint rate from the point of origin of the fuel coal to its points of consumption, and thereby be enabled "to charge a lower rate for the fuel coal than for the commercial coal between the same points." And further, in display of the easiness with which this can be accomplished and "how readily the Commission's order lends itself to manipulation of rates," they say that they have only to publish a nominal delivery point beyond the real delivery point, publish a rate to that point which they do not intend to charge and call their actual rate to the junction point, based on the special circumstances and conditions, a "division." They then ask if "the Commission can so easily juggle a rate for a good purpose, will not ingenious traffic agents and coal operators do the same for their own perverse ends." If such a situa-

tion artfully produced be used as a device for giving preferences the Commission might be able to find some means to defeat it. At present we must regard its possibility as relevant as exhibiting a misconception of the Commission's purpose. The Commission has not said what the rate should be, nor has it said, as we have seen, that the local rate to the junction point should be the same as the rate beyond that point. The Commission has ordered equality and struck down what it deemed to be preferential charges, even though they were made under formal tariffs. If there may be legal or illegal evasion of the order, we may wonder at the controversy. If the difference between the effect of the order and what the companies can do or want to do be, as is contended, a "question of words"—a "question of the nomenclature to be used in tariffs"—the order of the Commission may still be valid. Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the Interstate Commerce Act, can look beyond the forms to what caused them and what they are intended to cause and do cause.

There are other contentions or rather phases of those that we have considered and which seek to further emphasize the strength of competition as a circumstance or condition differentiating the traffic. For instance, it is urged that the shipment of the fuel coal to a particular railroad "for the use of that railroad" makes special the traffic. And, further, that "a railroad is not a person" but is "rather in the nature of a geographical division and extends through long distances." Pushing the argument or illustrations farther, it is urged that a railroad company may be distinguished from the physical thing, the railroad itself, and may be a locality where a commodity is used, like "a river, a county or a city," and be entitled to preferential rates to accommodate competitive conditions. The *Import Rate Case*, 162 U. S. 197, is invoked as anal-

ogous. We cannot accept the likeness nor the distinctions which are said to establish it. The railroad company cannot be put out of view as a favored shipper, and we see many differences between such a shipper receiving coal for use in its locomotives and a nation as the destination of goods from other nations for distribution throughout its expanse on through rates from points of origin.

The point is made that "the Commission's method of filing fuel coal rates is illegal under section 6 of the Interstate Commerce Act and under the Elkins Act," and the latter act and § 6 are quoted in illustration. The rather vague argument which is urged to support the point lands in the proposition that the right to violate the law as to preference in rates is justified by the law in its requirement of the filing of schedules of rates. However, counsel say that "it all goes back to the same principle" "dealt with under point 1." We have sufficiently discussed point 1.

The decree of the Commerce Court is reversed and the case remanded with direction to dismiss the petition.